No. 2438

United States Circuit Court of Appeals

NINTH CIRCUIT

CHARLES H. BAKER, ALGERNON S. NORTON, and SEATTLE WATER FRONT REALTY COMPANY, a corporation,

Appellants,

vs.

JOHN W. SCHOFIELD, as Receiver of the MERCHANTS' NATIONAL BANK OF SEATTLE,

Appellee.

BRIEF OF APPELLEE

FREDERICK BAUSMAN,
DANIEL KELLEHER,
R. P. OLDHAM,
R. C. GOODALE,
Attorneys for Appellee.

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STATEMENT.

Baker's Conduct Generally. Baker, covered with judgments and liabilities (254), was appointed receiver in 1895 by Comptroller Eckles, a friend of Baker's rich father in Chicago, (298), this in spite of the protests of creditors (298), for Baker owed this very bank $10,000.00 on direct loan (299). Having the indelicacy to accept this trust, he was not slow in claiming an offset on his note, and the friendly Eckles endured this until 1897, when he suggested a submitting of these questions to a court (Addenda 2, infra). Baker admits that he never sought an adjudication. (302-3). Instead, he clung to the receivership a year and a half longer, when a new comptroller, Dawes, became emphatic about the liability. (302). Then Baker in a clever letter resigned. (Addenda 3). This in April '99. As for the note, it was sold as worthless in 1899 by the succeeding receiver, Frater, because of Baker's insolvency (168). But Baker was at that very time secretly acquiring, as he now admits, this very land, equal in value, in '99, to the note. His own father bought the note through a lawyer, one Hardin, as a worthless asset (305).

The very day after mailing his resignation he hurriedly recommended and accomplished a sale of the bank's *remaining* tide lands to an intimate friend, concealing that friend's name in the trans-

action, however, and making him a handsome profit. This friend, Anderson, he had formerly been charged with assisting to another large profit, hence his concealing his name from the Department. As to this queer transaction, see our Addendum 4.

The foregoing is not our story. It is Baker's, his own. His diligently secret conduct after resigning, and his attempt to deceive this court in his answer, will be detailed later.

Baker, though wealthy, or "well fixed" (311), apparently never troubled himself afterwards about the note. As for the depositors, they have received dividends of only 52% in all (172).

Changes in Baker's Answer.

Baker's answer was not originally in its present form. On the contrary, it contained positive falsehoods, corrected, only after exposure, by interlineation at the opening of trial (96-7). Several months before the trial (324 top) he had given his deposition and had been confronted with a discovered letter. (His deposition was not used, as he took the stand at the trial.)

Our allegation was that Baker while receiver had obtained State land contracts, that in November, 1897, he had sold Simpson two, covering Blocks 429 and 430, with a secret understanding that he, Baker, was to have himself Block 430. Notice our three explicit allegations (6, 7): (a) That Simpson held 430 in *trust*. (b) That Baker, when he after-

wards took the land off Simpson's hands through Norton, merely *reimbursed* Simpson. (c) That Baker's interest in 430 arose *during* the receivership.

Now for the original denials. Simpson having died in 1906 (133), Baker, in the apparent belief that all testimony had perished, personally answered:

First, as to the *time* of his buying from Simpson:

"This defendant denies that he as receiver or in any other capacity held the contract to purchase said tide land block for his own use or benefit after the sale to Sol G. Simpson until after he repurchased said block from Sol G. Simpson in the open market *after the termination* of his connection with said receivership." [Original end of Par. IV. changed at trial by striking out all after the word "market" and inserting, as it now reads on page 24, "which purchase was agreed on in the spring of 1899 and finally consummated in 1905."] (96-7.)

The word "spring" he narrowed by his other interlineation (p. 97) to "about the month of March, 1899," (top of p. 27).

"Q. You were still receiver?

"A. Yes, I was receiver. I did not go out for a month after that, I think." (271.)

Thus his new pleadings now confess the transaction within the receivership.

But that the original answer intended denial of transaction and even of negotiation *during* the re-

ceivership the court can see by the following, which they have left unchanged. Baker continues:

"And denies that he had *while receiver any agreement* with said Simpson, secret or otherwise, by virtue of which this defendant *was to become thereafter* the owner of said block, and that said Simpson held said block or the contract thereto subject to a secret trust or in trust, and denies that under an agreement with said Sol G. Simpson or at all while receiver this defendant was to have any interest in said contract or any of the lands described therein." (Par. V. middle of p. 25, *left unamended.)*

Notice "any agreement * * * to become." Thus paragraph V. stands to-day in flat contradiction of the amended end of IV.

The original purpose was to prove a purchase *long* afterwards (not shortly afterwards) and without previous trust at all. Observe:

"This defendant denies that said Simpson *ever* held said lease [meaning the harbor lease in front of Block 430] or assignment of said contract [meaning Block 430 in question here] for the benefit of this defendant." (beginning Par. VII. of Baker's Ans., p. 26, *left unamended).*

Next as to our allegation that the consideration was mere reimbursement:

"This defendant further denies that he from time to time or at all *advanced* to said Simpson or *reimbursed* said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block." [End of Par. V. of Baker's Ans., Rec. 26. This also *left unamended.*]

The Company answered, and still answers:

"This defendant further denies that said Baker from time to time *advanced* to said Simpson the sums that were paid by Simpson to the State of Washington, but avers that *long after* the said Baker ceased to act as receiver of said Bank, that *he purchased* from said Simpson the said contract." [End of Par. V. of the Company's Ans., Rec. p. 59. Left unchanged notwithstanding Baker's own altered answer.]

But shortly after this suit was begun there came to light a letter written by Mr. Baker on a railway (147). He addresses one Mark Reed, the son-in-law and attorney-in-fact of Simpson. Notice the date.

[Caption of U. P. Railway] "May 9/04.

"I had a talk with Mr. Simpson in S. F. about the tide land which he holds *in trust* for me. I asked him if he would take my note in settlement of the *advances* he has made, together with the interest accrued thereon. The first two or three payments I made myself. Mr. Simpson's books, however, will show the status of the account. There is one more payment due next March to complete the contract with the State," etc., etc.

[That it was receivership money that made the "first two or three payments" referred to in this letter he admits (282-3), and his books account show this, too (191-2-3).]

"Q. *After the revelations contained in this letter* and several simultaneous documents, it was found necessary to amend the answer, wasn't it? Just state that—you know it, don't you?

"A. The answer was amended, yes.

"Q. That is known as the Seattle Water Front Realty Company's?

"A. Yes.

"Q. Did your counsel have a conversation with you as to whether you should amend your *personal* answer in the case after that revelation?

"A. Yes.

"Q. And they decided that they would not file a new amended answer then, didn't they?

"A. No, they said they would make the amendments when the case was called.

"Q. But they said, though, they did not wish to file a formal written answer for *you* anyway, didn't they?

"A. No, they didn't say that.

"Q. But such circumstances came to pass that they considered it imprudent to reduce your statement again to definite form?

"A. Mr. Grosscup told me from the beginning that——

"Q. Never mind about the beginning—just answer that question.

"A. Will you repeat the question?
(Question repeated.)

"A. Well, they said they would have to make the amendments when the case was called.

"Q. Now, they made no amendments to this answer other than those that were made by interlineation here in court the day before yesterday at the opening of the trial. That is true, isn't it?

"A. I think so." (294-5.)

Except for this letter Baker might have claimed, and until its exposure he was keeping his pleadings in a position to claim, repurchase as late as 1905, when Simpson conveyed through the State to Norton. This would be six years after the receivership. Now he was confronted with having acknowl-

edged in 1904 a secret ownership antedating the 1905 sale and apparently by some years.

It is difficult to see which is the more flagrantly wrong in this answer, his denying that the land ever had been held in trust by Simpson when, as will be seen, it had been held at least six years in trust, or his denying that settlement was made by reimbursement. As to this last, there could be no opportunity for error in memory, for he had had *two* settlements with Simpson, in both of which reimbursement was the sole basis. The *first* was in '99, when he secretly gave his note (what became of it, where is it, how was it ever paid?) for about $400.00, "cost and interest" (284,271); *second,* in 1905, when he "consummated" the '99 secret arrangement. Both he himself (292-3) and Reed, who dealt with him for Simpson, agree that (not confusing the certain "harbor area lease") Block 430 was turned back to Baker in 1905 solely on the basis of reimbursement, Reed saying:

"Q. Did you receive for this land which you were releasing in 1905 anything else than your advances?

"A. No sir." (Reed, 153.)

And so, at the trial, Baker was overwhelmed by this letter.

"Q. There again *you were ignorant of this blue letter* written on the railroad *when you told your counsel to file that answer?*

"A. Yes.

"Q. In the letter of May 9, 1904, written on

the railroad, you say, addressing Mr. Reed about Mr. Simpson: 'I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon.' In the light of that letter you wish to say that that statement made in your answer is untrue both as to 1899 and as to 1905, don't you?

"A. Yes sir, it is untrue (293).

* * * *

"Q. Then it is not true in your answer when you say: 'This defendant further denies that he from time to time or at all advanced to the said Simpson or reimbursed the said Simpson for sums paid by him to the State of Washington on account of the purchase price of said block,' that is not true then?

"A. That is not true (293).

* * * *

"Q. Now, then, you sold this property to Mr. Simpson in 1897 for less than you had paid the State of Washington, didn't you?

"A. Yes.

"Q. And when you bought it back from Mr. Simpson, as you call it, in the spring of 1899, March, I believe, was the month, you say you bought it back for what he had advanced on the property. Is that correct?

"A. Yes (295).

* * * *

"Q. Then if your answer before it was amended on the very day of this trial yesterday, if your answer then stated that you bought it back *in the open market,* that is not true, is it?

"A. No, that is not true. (291. "Open market" was left unamended after all, p. 24, notwithstanding its absolute falsity, 284, 291.)

"Q. Well, then, your counsel stated it for you after conferences and after an examination of certain exhibits, that Mr. Simpson never had held that in trust for you, you know that, don't you?

"A. I think that is what the answer stated.

"Q. And that answer is not true, is it?

"A. No, it is not.

"Q. As a matter of fact, you now admit on the stand that he *had held it for six years in trust for you at least,* don't you?

"A. Yes.

"Q. And you wish to put upon your counsel the burden of making a misstatement so gross as that?

"A. He can put it on himself. I didn't know anything about the complaint" (287).

These misstatements were too gross, too, to be mere inadvertence of anybody. If, however, error of counsel so material had occurred, and if to them the blame is to be laid, then pre-eminently a duty devolved upon them of letting the client clear himself upon the stand. There he was, testifying under the gravest suspicion. Why did not his counsel ask him some such question as—Mr. Baker, by our carelessness we have placed you in a compromising position. Please explain to the court what you did tell us about purchasing from Mr. Simpson through mere reimbursement and what you did tell us as to his ever having held this in trust for you.

We are not censuring learned counsel. Their client, it is plain, had deceived them. The most

they could do was to make his answer seem a hurried one. In this again they failed. The answer was not filed until July, 1913, though the suit was begun in February (285). An extension of time, too, had been gotten from us. Moreover, Baker and Mr. Grosscup had conferred in Chicago and Mr. Grosscup had even gone to Washington to examine the Comptroller's files (285-6). All this before the answer.

As to the answer of the Company, which he owns, and of Norton, they contain equally contradicted and uncandid denials and allegations.

As to the uncertainty and the evasiveness of the answers on the point of laches, see post, p. 87.

How Block 430 Became an Asset.

The tide lands around Seattle were appraised by the State in gloomy 1895 (117). In '97 these values were outgrown and no regard was ever afterwards paid to the State's appraisement by purchasers (116).

Tide lands are sold by the State thus: Surveys are projected from upland into littoral. The upland owner gets the preference right to buy the tide lands, these in fee simple upon ten annual installmnts. (Mere contract right to buy is "realty" even before deed. *Infra,* p. 33.) Then something else accrues. The upland owner having thus acquired the "tide lands" has a right to get something addi-

tional, *the harbor area* (*infra,* p. 22). The latter he can never own, only enjoy as an appurtenance. Since a harbor lease figures in this case appurtenant to Block 430, the distinction may be kept in view though the item is of small importance.

The tide lands (not the harbor lease area) are subject to a well-known filling contract which the State made for Seattle harbor and which gives to a certain company a right to fill all such lands, notwithstanding the State may be selling them. This charge does not figure in values and lands are freely trafficked in subject to the filling rights, the market price meaning price subject to balance due the State (215).

Such is a general sketch of these littoral rights. Baker in January, 1897, addressed to the Comptroller Plaintiff's Exhibit 3 (98). He invites the Comptroller to "ratify" contracts he has made for the purchase of a group of tide land blocks as "upland owner." Among these was Block 430, by all testimony the largest and most valuable (118, 166). He calls this a "valuable asset of the estate." The Comptroller ratified them, mentioning their assignability.

The contract (numbered 728), calling for ten annual payments aggregating $1488.00, Baker made out of trust funds two payments of $148.00 each (191, 192-3, Journal Entries 1/12/97 and 3/31/97), and the contract as an asset was listed in his journals under "Additional Assets Good" (193).

The Sale to Simpson, '97.

In October, 1897, one Seeley, an examiner of the Department, visited Seattle. On his advice there was obtained from the Federal court a general order concerning the sale of assets. (No asset is in law salable on mere direction of the Comptroller or Receiver, but only on the order of a court.) This order we discuss fully, *infra,* p. 31. The lower court held properly that it authorized nothing but sales of personalty. (Our Addendum 1, *infra.* p. ——.) However that may be, all are agreed that it authorized only a sale of *bad and doubtful* assets. Seeley himself writing to the Department (122-3) so speaks of it.

It was conceded at trial that the right of Baker to sell this asset rests only on this order and no other (120).

Baker follows Seeley's report with a letter October 29, 1897, giving a rosy picture of the future through the Klondike discoveries. Property is rising in value! "The next six months" of the trust, he says, will be among the most active in its history (103, bottom). Yet a month after this letter he sells this asset to Simpson for less, he admits (295) than he had paid to the State a few months before. How this error, if error it was, occurred is nowhere explained, yet all must agree under the testimony that the market was not falling, but was rising.

So Baker, keeping unsold the estate's adjoining tide lands, sold to Simpson in November, '97, Blocks 429 *and* 430 for $315.20. For 430 he got $198.00 (108), but the amount paid by him on 430 alone had been $296.00 and interest (115, 191, 193). Here was a positive loss. Yet Block 430 was reasonably worth from $1000.00 to $2000.00 in '97. When we say "worth" we mean, of course, above the balance due the State on the purchase price, deferred State payments not being considered in the market (215).

Nor can Baker say that the subsequent fate of his other tide lands, not sold to Simpson, justified his judgment in '97 as to 429 and 430. On the contrary, he admits that the others were sold by him within thirteen months at very marked advances (289, 290 and Addendum 4), he getting for merely contested (290) rights in a portion of the inferior Block 431 $1000.00, besides a profit of $750 to Anderson.

In fine, nothing in 1897 justified the sale to Simpson at less than a fair profit. Simpson's payment was nominal.

This price, if noticed, doubtless passed as a mere bad bargain, for his now alleged repurchase at "cost and interest" thirteen months later had not then come to light to expose his own interest in the price.

Seeley, for his part, had nothing to do with the sale to Simpson, only with getting the general order of court. After his report he apparently left Seattle for good.

As to Baker's advising the Department of this sale to Simpson only a line appears in a voluminous *general* report the next day, November 30 (Plf.'s Ex. 9). Comptroller Eckels, his father's friend, whose request a year before that he get his note liability adjudicated he had been able to ignore, was still Comptroller, but shortly after the sale a new Comptroller, Dawes, came in. He called, April, 1898, for a *special* report on everything done under the Seeley order, "the name of the purchaser, the date," etc. (129). Baker did thus specially report, *but wholly omitted this sale* (131). It is impossible to read these two exhibits and feel that Baker was not concealing this sale. On the stand he offered no explanation of this special report.

The period of change between the two comptrollers was a happy one for concealment by Baker. Your Honors will not fail to notice the effort of the new Comptroller to be fully advised in this report.

The '99 Repurchase.

The lower court, in view of Baker's contradictions, his tardy explanation of a "repurchase," the nominal price paid *by* Simpson to begin with, and the mere reimbursement paid to him later, found an understanding with Simpson beforehand (Opinion Addendum 1, *infra*. p 116.) and an original fraud (decree 78). Perhaps the court did not fail to notice also the following mode of questioning their client on the vital question of a secret understand-

ing with Simpson in '97. We had distinctly alleged (6) that he had sold Simpson *two* blocks, 429 and 430, "with the secret agreement that Simpson should hold Block 430 for the use and benefit of Baker." Now, observe:

"Q. At that time, Mr. Baker, and for a considerable time after that, did you have any reserve interest, in expectancy or actual, present or in expectancy, in *these two contracts?*

"A. I did not.

"Q. Did you at that time have any expectation of ever acquiring any interest *in those two contracts?*

"A. I did not" (262).

It would be very doubtful whether on proceedings against him for false testimony Baker would be liable if his reserved interest was not in both but only in one. This form of question, put twice deliberately by his counsel must strike the attention of this court.

As to repurchase in '99, the court, without expressly finding that there was none, indicated that whatever then occurred was simply in pursuance of previous arrangement in '97. It is absurd to say that Simpson, without previous understanding, would have resold in the spring of '99 Block 430 for the sum that Baker pretends, $300.00 or $400.00, mere reimbursement of cost and interest.

Here is Baker's cross-examination:

"Q. You as you say bought back Block 430 from Mr. Simpson while you were still receiver—

Block 430 of Seattle Tide Lands, in the spring of 1899 while you were still receiver, for just what he had expended on it, is that true?

"A. That and interest, yes.

"Q. What? and interest?

"A. Yes.

"Q. And what was the amount which you gave him?

"A. I think it was about $400.

"Q. About $400.00—you have also testified that you thought that to be the *value* of Block 430 at that time, have you not?

"A. Yes.

"Q. And it is in evidence that you sold—it is also in evidence that at that very time you sold to what you call Pigott and Hofius your merely contested rights in the adjoining Block 431 for $1000. Is that so?

"A. Yes.

"Q. Mr. Baker, what did Mr. Simpson give you as evidence that he had thus transferred back to you while receiver a title in that land?

"A. He did not give me anything.

"Q. *Did he give you a scrap of paper?*

"A. No, he did not.

"Q. *He continued to hold it exactly as he had held it since 1897, didn't he, as far as the public record is concerned?*

"A. Yes" (284).

Baker is asked again:

"Q. And in 1899, when you bought back Block 430 from Mr. Simpson, while you were still receiver, you paid him for this large Block of twelve acres

only $300.00 and interest, and you sold the adjoining land, which you were in litigation about—your mere contest interest in it—for $1000.00 at least, didn't you?

"A. Yes."

"Q. And they were simultaneous transactions, practically?"

"A. About, yes."

(P. 290, and see Addendum 4 *infra*.)

Lower court found the '19 value between $5000. and $15000. Infra 116.

As to notice to anybody of this transaction it is not so much as claimed by Baker that he gave notice to anybody, either Comptroller or creditors, or that the "repurchase" was by anybody whomsoever actually discovered. He does not even allege as much in his answer, but only that what we complained of in the *complaint* were the things we had knowledge of (70). Now, our *complaint* alleged an original sham sale in '97. It is he, not we, that alleges, "repurchase." It is their amended answer that sets that up and yet does not allege either notice given or knowledge acquired.

Sale by State (Simpson) to Norton, 1905.

The settlement with Simpson through his son-in-law, Reed, occurred in August, 1905, *on mere reimbursement* of his advances (153), as contemplated in the railroad letter of May, 1904. The sum was about $3000.00, inclusive of the "harbor area" (153, 163). Block 430 was then worth $80,000.00 (166).

Norton, called as our witness, confesses his part. In 1905 the conveyance passed directly from the State Land Office at Olympia to Norton of New York, whither Baker had just removed from Seattle (305). Baker's lawyer and intimate friend, he paid nothing for the land (174, 60). He never had been in Seattle until 1912 (185). A deed recorded to Norton could attract no attention. Even Simpson's name did not go on the King County records, for Simpson assigned the contract in the Land Office and then the deed leaps from the State in 1905 directly to a gentleman in New York. (Our allegation, pp. 8-9; answer 61-2.)

In those seven or eight years not one document (except the bare sale *to* Simpson) had been filed in the Land Office connecting Baker or anybody under him with this property again, nor any document of any kind relating to Block 430. Hence if anybody had taken the pains, out of a wild suspicion that Baker and Simpson had long before had secret connivance, to ransack the files of the Land Office between 1897 and 1905, he could not have found one thing there except what all knew was there long before, the simple sale or assignment of the contract on Block 430 by Baker, Receiver, to Simpson. Nor even between the parties was there a "scrap of paper" until Baker's railroad letter of May, 1904, to Reed. On the settlement with Reed in 1905 the first writing is filed in any public Office.

A correspondence is then begun with the Land Office by Norwood W. Brockett and by Mr. Hardin, Baker's Seattle lawyers. Several letters (it is now 1905) pass from these gentlemen to the land office, and in every one of them they ask the Land Office to make a transfer from a Mr. Simpson to a Mr. Norton. *Not one line mentions the name* of Charles H. Baker, in whose employment each of these gentlemen then were engaged as lawyers (308, 310). No such natural language occurs as, At the request of Mr. Charles H. Baker we desire you to transfer from Mr. S. to Mr. N.; or, We have been requested by Mr. Charles H. Baker of this city to have you transfer, etc. Each of these letters omits Baker's name. Baker admits this and offers no explanation (310).

These letters (248-253) are further curious in that all of them except the last proceed still further in point of caution. Note the captions on each. They invite reply "to N. W. B., personal." The last invites reply to "N. W. B.'

Here we may note a point. Baker, as one of his excuses for concealment, says that he had been very much in debt. *But in 1905 he admits he was out of debt.* "Oh, I was out of debt in 1905, completely out of debt." (304). Why not then take the asset in his own name? He attempts the explanation that he thought of going to Korea or China. In point of fact he did not go (175), but supposing the intention, he could as easily have taken the title in his own name and left a power of attorney with Norton.

The question why he did not do this was put to both Norton and Baker and no explanation was offered by either (306-7). Observe, too, his caution as to connecting his checks with this property. There being a balance, exactly ascertained, due the Land Office, he does not make his check to the Land Commissioner, but to Reed, Simpson's attorney in fact. This check, Reed, apparently distrustful of Baker (154), forwarded instead of his own personal check. And there was still another check, this to pay taxes. Notwithstanding these were known to a penny, $691.51, Baker does not make his check payable to the county treasurer, but to his lawyer, Brockett (279). If your Honors will look at this check (Deft.'s Ex. A-10), you will see that the lawyer at least had the caution not to endorse it to the treasurer. He evidently paid in cash or by his own check.

Norton, as we say, confesses that he never gave anything for the property. So he gave Baker two declarations of trust, before he conveyed it for him to the Realty Company. Neither trust paper was ever recorded (306). If they had been, it might have become known that Baker had acquired twelve acres of tide lands, the first and only thing to attract attention. Thus the property was two years in Norton's name, 1905-7, under unrecorded declarations of trust to Baker.

Sale by Norton to the Realty Company in '07.

Norton confesses his part in this additional step. The company was organized in Seattle with dummy directors holding trivial shares (175-6). Then all the records were whisked out of the State to New York, where they have ever since been kept (184). Baker received all the stock except about three per cent. From that time to the present Baker has been the holder of 90% and upwards of these shares (180). Norton holds 3%; the rest went to friends as gifts (178). Yet Baker has never been a director in that company (307). The laws of the State of Washington (Laws '95 p. 355; Rem. & Bal. 3691) required companies to file annually a list of their directors. The caution of Baker is unmistakable. All his shares except 250 were kept in Norton's name; so for six years, 1907 to 1913, when this suit was commenced, a certificate for 1933 shares in Norton's name (180), endorsed and delivered to Baker, has remained unchanged.

This Company was organized by one Meacham, who got four shares (176). Meacham and Norton had a great deal of correspondence about it, but never through Baker (183), though it was through Baker that Meacham's name was obtained by Norton (75), for as stated above Norton was never in Seattle until several years later, 1912. Baker did not subpoena Meacham. Asked why not, he gives no fair explanation (309). We, for our part, tried to subpoena this gentleman (189).

It was not sought to be shown by the defense that the Company gave for the land anything but its capital stock, or any money at all except such portion as Norton or Baker between 1905 and 1907 might have advanced for taxes and also for Norton's professional services. Only one portion of the stock of any moment has passed for something like value. This has gone to his wife, who divorced Baker for desertion. It is held by a trust company in Seattle, but Baker is wealthy and she holds plenty of other securities.

The Harbor Lease.

All that is known of this is that when Baker came to settle for Block 430 with Reed (Simpson) in 1905, the latter insisted not only on reimbursement of taxes and previous Land Office payments, but that a lease, Harbor Lease 181, be taken off his hands (163). This species of property we have described, *ante,* p. 11.

Reed insisted that as Baker was making him deliver 430 he should take the lease with it, for without 430 it was worthless (163). There was some wrangling. Finally a flat sum of $2000.00 (over the $1077.00 due the State) was agreed on as covering reimbursement items already due Simpson on 430 *and* the value or cost of the lease. After a vain effort on the stand Reed was unable to apportion the amount of reimbursement, nor did Baker attempt, though following him in the trial, to distribute them.

In our tender we included this whole $2000 and interest.

Baker's Secrecy.

1. Obscurity in *general* report of November, '98 (See Plff.'s Ex. E), where he refers to the property by contract numbers and not by the *block* description which he had used to get authority to buy (98). See his examination on this peculiarity (296-8).

2. Concealment entirely of the sale to Simpson in his requested *special* report of April, 1898, to the new Comptroller (130).

3. Complete concealment in April, 1899, from his successor, Frater, who saw him frequently (168).

4. Admitted secrecy between himself and Simpson from '99 down to 1905, the transfer to Norton. "Six years in trust" (287). William Pigott making repeated attempts *after* '99 to buy, was told by Baker that Simpson was the owner (330).

5. Proved secrecy from 1905, though admitting himself out of debt after that date (304).

6. "Brockett correspondence," 1905, on behalf of Baker with the Land Office, conducted by his attorneys, Hardin and Brockett (248-253). The name of Baker is entirely omitted and only Norton and Simpson mentioned. Baker out of debt and able to avow transaction if innocent.

7. Making his checks not to the Land Office and to the Treasurer, when in the settlement with Simpson (Reed) he had these payments to make, but to Reed and to Brockett, though the amounts due the public offices were known to a penny—$1079.28 to the Land Office and $695.50 for taxes. The check to Brockett *(supra.)* was not even endorsed over to the County Treasurer by that lawyer.

8. Transfer in '05 indirectly from Simpson through the State to Norton, Simpson's assignment of the contract to Norton never being recorded *(supra.)*.

9. Transfer not to Baker, but to his lawyer in New York.

10. Withholding from record Norton's two declarations of trust.

11. Organization of the Realty Company by dummies.

12. Immediate and permanent removal of all records of Realty Company to New York.

13. Baker's withholding himself from the directory of the organization at all times since its organization ('07), though he held never less than 97% of the stock, and his keeping nine-tenths of his holding in Norton's name.

14. Extraordinary reticence to J. B. Hill, formerly his bookkeeper in the trust, on intimate terms with him ever since.

15. Failure to call as witness his lawyers, Hardin and Brockett, the former "acquainted with his relations with Simpson" (309) and the latter the one who concluded the transaction with Reed (309).

16. Failure to call Meacham, who organized the dummy corporation, and failure to call so much as one witness to say that he knew of Baker's interest in 430 even after 1905, or to say that anybody in Seattle knew of it.

17. Failure to say that *he* ever had told *anybody* except Norton either in early or recent years.

18. *Fourteen years' ownership of this property and yet never once in his own name.*

19. False denials in all the answers.

(a) They deny that the bank ever had even the "preference right" (22) to purchase tide lands in the face of his own contemporary letter stating this very thing (98) and obtaining it from the State!

(b) They allege that this right had no "substantial or any value" (23) in the face of his letter (98) saying this right was "a valuable asset of the estate," and they call it a "desperate asset" (22) when they had listed it as "good" (193) and every transaction after it was acquired showed increasing value.

(c) They allege that the assignability of this right was "limited in time" (22), to support which

there is neither evidence nor law and which is contradicted by his assigning his remaining contracts two years later. He himself had assured the Comptroller of their being "assignable," and the Comptroller had answered, noting this very advantage (98-9).

(d) They allege he sold 430 to Simpson for "more than the amount" paid the State (23). Baker admits he sold to him for less (295).

(e) False denial as to the time of repurchasing, *supra.*

(f) False denial as to the "advances", *supra.*

(g) False assertion as to buying from Simpson in "the open market," *supra.*

Testimony Other Than Documentary.

Except as to values, Baker called no witnesses other than his bookkeeper, J. B. Hill. The latter throws little light on the transactions, and he did make the damaging admission that during twenty-three years' intimacy with Baker he had never learned of his owning an interest in these twelve acrs of tide lands.

"Q. You never heard from Charles H. Baker or any one that Charley Baker had an interest in Block 430 until about the time this suit was brought, did you, Mr. Hill?

"A. Not until some time after the receivership was closed out.

"Q. Some time after this present suit was brought—you never heard that Charley Baker

claimed an interest in Block 430 until this suit was brought a year ago, that is a fact, is it not?

"A. Yes" (239-240).

* * * * * * * * *

"Q. Talked about his children and his wife and his prospects, and his luck, bad and good?

"A. Yes.

"Q. And you were closely associated in those years, 1887, 1898, and 1899?

"A. Yes.

"Q. Very intimate?

"A. Yes.

"Q. And after that your friendship continued?

"A. Yes.

"Q. He stayed around here for six years afterwards, until about 1905, coming and going a little, but he stayed here as a resident?

"A. Off and on, yes.

"Q. And when he would come back, he would see you pretty often, and you would see him in a friendly manner?

"A. Always friendly.

"Q. Always friendly, and talked freely together in all these years, didn't you, until he finally left here in 1905, or about then?

"A. I think that is so.

"Q. That is a fact, is it not?

"A. Yes.

Then he says that after Baker left Seattle they frequently met.

How Baker could undesignedly avoid all these years mentioning to this man his ownership of a property once handled in common, it is not easy to see. Of all men Hill, formerly the trust's bookkeeper, was the last whom Baker dared to tell.

As to other witnesses, we have already commented upon his not calling his lawyer, Hardin, who he admits "knew of his relations with Simpson," or Brockett, his other lawyer, who "closed the transaction" in 1905 with Reed, or Meacham, who organized the dummy corporation in Seattle. He would give no explanation why he did not call these. (309,310).

The authorities are unanimous that defendant's failure to call witnesses such as these raises a presumption that their testimony would be unfavorable to him.

> *Re Kellogg,* 113 Fed. 120, affirmed in 121 Fed. 333. Action by trustee in bankruptcy to set aside mortgage. Failure of holder of mortgage to call mortgagee. The *Joseph B. Thomas,* 81 Fed. 578, per a member of this court; *Norguet v. Paramount Mills,* 177 Fed. 970.

The general rule is well stated by the Supreme Judicial Court of Massachusetts in *Cheny v. Gleason,* 126 Mass. 166, a bill in equity by principal against agent in fraud.

"The neglect of a party to produce evidence which is in his own power is a fact to be considered by the jury in connection with all the other facts,

and in a case of fraud, *the parties to which are within reach as witnesses, may be of great weight against him.*"

We, for our part, had human testimony as well as documentary. Two men in confidential relations with Simpson testified to admissions made by him. One was Rotch, bookkeeper for Simpson. He places the date of admissions by Simpson after 1900. In one talk Simpson stated he *never* had had any interest in this property himself (140-143). Turner, president of the First National Bank, of which Simpson was a director, relates two talks. Simpson had said of this transaction "it would not bear investigation." One was after 1900, the other approximately in 1898-9 (144-5). If in 1898, it antedated even the alleged repurchase of '99, and that it was before that seems clear because Simpson's words, as quoted by Turner, were that a *portion* of his tide lands belonged to Charley Baker. That would mean that Simpson still had some at the time of this conversation. Now, after the spring of '99 he had none, having sold No. 429 to Pigott and Hofius.

The legal admissibility of these admissions will be discussed *infra,* p. 70.

Reed's testimony was that in 1904 Simpson, being unwell and going to California, gave him an account of his assets. Block 430 "was Baker's" (155-6).

The court will finally be struck by the failure of Baker to call so much as one witness to prove

that his interest in *Block 430 was known to another soul in Seattle,* even after 1905. Why did he not call business men, neighbors, or what not, either in Seattle or in New York, to show that to them at least he made no secret of his ownership? He had lived in Seattle from before 1895 down to 1905, and had organized companies there for his rich father.

Yet he calls not one. And what he ought to have called to his aid is made more prominent by one feeble intimation. McGraw & Kittinger, real estate men in Seattle, he said, had written him one letter in 1906 about buying the property (281). Then a court naturally asks, Have you only one such evidence? Or, since you so mention one, where is their letter or a copy of it? Or, if you have lost it, why do you not call one of that real estate firm to testify? Again, Norton, your attorney, saying that in the course of a year he wrote from New York to Meacham, the dummy director in Seattle, as many as 50 or 100 letters, believes that you never wrote a letter yourself to Meacham (183). This is the Meacham against whom we issued a fruitless subpoena (189). Why did they not call Meacham? Does Baker's faint explanation on page 309 seem adequate? Norton indeed tried to say that occasionally somebody would come to him in New York about the land, stating that they had seen Mr. Baker. We call it a feeble effort, for when pressed he soon became so vague about these that no court will attach importance to the statement (183). Perhaps Mr. Baker told such persons that it was Norton

who owned the land, just as he had told Pigott, between 1900 and 1903, that Simpson, not himself, was the owner (330).

As to Simpson's testimony "lost by death," their actual gain in this respect, See post 75.

All living witnesses testify against Baker, (Reed, Turner, Rotch and Pigott) and he fails to call his living lawyers. Norton was made to testify by our process.

LEGAL CONCLUSIONS.

1. The sale to Simpson in '97 was void.

2. Even if good in law it was actually for Baker's benefit.

3. The repurchase, whether in '99 or in 1905, inures by law to this Receivership.

CONCLUSION I.

THE SALE TO SIMPSON IN '97 WAS VOID IN LAW.

For two reasons:

(a) The court's order never authorized the sale of real estate and (b) only the sale of bad and doubtful assets.

First. The lower court (*infra* p. ....) found that the Seeley order of court contemplated only personalty. We can see no other conclusion possible.

If tide land contracts be real estate, then there never was a court order for this

sale. And an order of court, let it be remembered, is essential. While a receiver, under §R. S. 5234 proceeds under the direction of the Comptroller, he can pass no title by that mere direction, and the order of court is equally indispensable.

R. S. 5234.—"Such receiver, under the direction of the Comptroller, shall take possession * * * and upon the order of a court of record of competent jurisdiction may sell or compound all bad or doubtful assets, and on a like order may sell all the real and personal property of such association on such terms as the court shall direct."

As the Supreme Court said in *Turner v. Richardson,* 180 U. S. 87:

"The receiver (of an insolvent national bank) here could not sell the collateral in his hands without obtaining an order of a court of competent jurisdiction. This order must fix the terms of sale."

The authorities are overwhelming.

Richardson v. Turner, 28 So. 158 La.
Ellis v. Little, 27 Kas. 707.
Tourtelot v. Booker, 160 S. W. 293.
Bodwell v. Rice, 19 Wash. 146.
Wallace v. Hood, 89 Fed. 11.
In re Earl, 92 Fed. 22.

Now, does a contract for the purchase of tide lands though still executory and not yet merged in conveyance, invest the purchaser with realty under the laws of Washington? The answer is emphatically in the affirmative.

In *State v. Superior Court,* 31 Wash. 445, which was *a tide land* case, held:

"In equity, upon an agreement for the sale of lands, the contract is regarded for most purposes as if specially executed. The purchaser becomes the equitable owner of the lands and the vendor of the purchase money. After the contract the vendor is the trustee of the legal estate of the vendee. Before the contract is executed by conveyance, the lands are devisable by the vendee and descendable to his heirs as real estate; and the personal representatives of the vendor are entitled to the purchase money."

And in *Washington Iron Works v. King County,* 20 Wash. 150:

"In equity *upland right owners* possess a real and substantial interest which they can transfer and assign as they choose, and the State cannot deprive them of this right. The term 'property' as applied to land comprehends every species of title, inchoate or complete."

In eminent domain on tide lands the same doctrines, *State ex rel Wilson v. Gray's Harbor,* 60 Wash. 32, and in *Book v. Thomas,* 61 Wash. 607, held that the preference right of the upland owner descends *to his heirs.*

The right evidenced by these tide land contracts has notoriously conferred the highest attributes of possession. Great buildings are sometimes erected before the deed is issued or even applied for. The quality of title is far greater than that of any occupant-locator of an unpatented mining claim, yet the title of such an occupant has been declared by the

Federal Supreme Court to be real estate of the highest quality descending to the heirs.

Moreover, it is not for this defendant to argue that it ought not to be considered realty. He himself classed it as such in a circular advertisement, in 1897, of the trust assets (224, Deft's Ex. A-2).

(b) Even if the asset be not realty but personality, it was clearly not bad and was not listed by the receiver as "bad or doubtful," as restricted by order of court, but as *good.* (193). Selling as a bad and doubtful asset what was really good might indeed give title to some innocent purchaser as mere discretion exceeded, but the property stayed in Baker's own hands or came back to him by an arrangement existing, as he admits, during the very receivership itself. Such a person is not an innocent purchaser of the asset. He at least must know that he had violated the terms of the order of court.

CONCLUSION II.

Even If Good in Law, the Sale in '97 was Really Made for Baker's Own Benefit.

This is a question of fact to be sustained by a perusal of the testimony and the opinion of the lower court. We shall not attempt to go over the facts but leave them as already stated.

The authority of findings by the lower court has long ago been established by Federal Appellate

Courts as not to be overturned except upon strong showing. This rule, which sprang up even under the system of depositions, has now five fold its force when the judge, as in this case, has the witnesses before him, sees their faces, hears their voices, and is influenced, as he ought to be, by their demeanor.

CONCLUSION III.

The "Repurchase," Whether in '99 or '05, Restored the Land to This Estate.

Under the overwhelming proofs and the finding that a secret agreement existed when the property was sold *to* Simpson in '97, it is perhaps of little moment to consider a subsequent repurchase. But defendant is at all times in this case confronted with the court's right to take him at his word, even if it does not believe him. His own story of this repurchase we have set out (*ante* p. 14), from which it is clear that while the repurchase was "consummated" in 1905, it was "arranged" in March '99 while he was receiver.

A purchase by a trustee during his term, unless authorized or ratified, is void in law no matter whether the original sale was valid and in good faith, and no matter whether the repurchase was for a fair consideration.

A plausible view contrary is as follows: If the original sale was without reserved interest, then the asset left the estate and the estate is in no way

prejudiced if the trustee buys it back. Somebody else might have bought it from the original valid vendee, why not the trustee?

But this is directly contrary to decisions deeply founded in public policy.

Let us first consider why the law forbids a trustee's selling *directly* to himself. Then we shall see why the law forbids his buying back from somebody else and thus *indirectly* selling to himself. Take the first case. I give a power of attorney to Jones. It is unrestricted, both as to things to be conveyed and persons to buy. Jones sells to himself, conveying my property of record from me, X, to him, Jones. I complain, of course, but he proves by overwhelming testimony that he deposited to my account five times what the place was worth; the testimony is unanimous that he has paid me five fold; I myself admit that he has paid me five fold, yet the thing is void.

Now, why? Because the thing, fair in some instances, would as a rule be utterly against public policy. If my agent can do this when he means me well, he can do it when he is really cheating, knows secret values in the estate, of mines, deposits, or impending improvements.

If he can do it when I am near, he may do it when I am far away. Upon me he places the burden of overturning the thing if, as we are supposing now, the thing is presumptively valid. But the law says that the principal must not be put to such a burden. Not only must the agent not be tempted to

do wrong, but no principal must be put in a situation where, being in doubt about a transaction, he must either accept it or bring a lawsuit at great cost, annoyance and doubtful result.

But is it different if the agent, having sold to another in good faith, merely buys back? No. There again the principal would be put to an unfair burden. My agent has sold a piece of property to a third person. I hear of it, am not quite satisfied with the price, but still think it only an error. A little later I hear that he has purchased the property himself from the vendee. Then I am suspicious, especially if he has bought it back at mere cost and interest, but even if at a fair price, I am not satisfied with this kind of thing. I complain. His reply is, "Sue me. The law being that I have a right to repurchase though still your agent, you cannot win unless you prove a secret agreement in advance. Sue me." I, for my part, am helpless. What chance shall I have in such a lawsuit? To suppose that two men would make such a secret agreement, is to suppose that they would deny it. I must accordingly sue two persons who have every reason in the world to swear me out of court. I must contest not mere prices but secret motives.

In the illustration I am supposing that I heard of the original sale, *to* the vendee, and did not try to set that aside. It is when the repurchase by my agent occurs that my right to complain accrues, for it is this repurchase that throws a badge of fraud on

the original transaction and makes me distrust what at first seemed only a mistake or a fair sale.

Lamentable indeed is the situation of creditors and stockholders if national bank receivers throughout this country handling millions of dollars' worth of securities, shall have the privilege of buying back at mere cost and interest or at all. Still more lamentable if these receivers are to have the privilege not only of buying back but of keeping the repurchase secret.

In *Boynton v. Bristow,* 53 Maine, 362, real estate was sold by the executors. Subsequently one of them bought it back.

"We are satisfied that the property was sold not for the largest but for the smallest sums possible. There may not have been any express agreements to that effect—most likely there were not—but it is impossible to believe that the executors did not expect to be able to buy it back again for the benefit of the heirs at the same price for which it sold."

This though there was *no finding of a previous agreement* of repurchase with the original vendee. The court added:

"It is enough, however, for us to know that the property was redeeded to one of the trustees for the same consideration for which it was sold before his duties as trustee were ended. Equity will not permit a trustee thus to deal with a trust property except for the benefit of the *cestui que trust*... Sound policy requires all the skill and efforts of a trustee to be used for the benefit of the *cestui que trust,* and to secure this end his private interest must not be allowed to come in conflict with his duty. If a trustee should be allowed to sell the trust's estate and then immediately buy it back for his own bene-

fit, his private interests would be in direct conflict with his duty. To enable him to buy cheap he must sell cheap. Instead of making known its good qualities and its real value and the true state of the estate, he would be influenced to disparage the estate by concealing, as far as he could, everything which would enhance its value, and to avoid clearing up any clouds that might hang over the title."

One of the leading cases in this country is *Michoud v. Girod,* 4 Howard 503. At a judicial sale validly and legally conducted a piece of property was sold at a fair price. The purchaser within a short time reconveyed to the executors individually. It was decided that the buyers at the sale were purely nominal, their reconveyance to the executors being at no advance. *Twenty-seven years passed before attack was made* by the heirs, and within that time the beneficiaries had some of them given releases, but the court said (p. 553):

"The morality and policy of the law as it is administered in courts of equity induce us to add that these purchases were fraudulent and void and may be declared to be so without any further inquiry, upon the ground that they were made through the intervention of parties who were nominal buyers of the property for the purpose of reconveying to the executors. Such a transaction carries fraud upon its face. The rule of equity in every jurisprudence with which we are acquainted is that a purchase by a trustee or agent of the particular property of which he has the sale or for which he represents another, whether he has an interest in it or not, *per inter positam personam,* carries fraud on the face of it." (Further of this case *post,* 68).

In *Creveling v. Fritts,* 34 N. J. Eq. 134, a purchase back by an executor, though at a fair price, was commented on as follows:

"The rule is now universal that no matter how fair the purchase by a trustee may be nor how ample the consideration he pays, the *cestui que trust* is at liberty in every case to set the sale aside, because if a trustee were permitted to buy in an honest case he might likewise buy in a case having that appearance, but which from the infirmity of human testimony might be grossly otherwise. Thus a trustee for the sale of land may, by the knowledge he acquires in the performance of his duties, ascertain that the land has an extraordinary latent value, as for example that it contains a deposit of valuable minerals or some other hidden treasure, and locking up that knowledge in his own breast, he might purchase the land for what might seem a fabulous price and yet get it for a mere tithe of its real value.

"The rule upon this subject is a wise public regulation, intended to protect a species of property which otherwise would be constantly exposed to peculiar hazard."

Baker, an engineer (254), foresaw better than anyone else the strategic position of these twelve acres.

Guerrero v. Bellerino, 48 Cal. 118, repurchase by administrators one month after the administrator had been discharged. Some years elapsed and the intermediate purchaser from whom the administrator acquired the asset died. Yet an attack by the heirs was sustained.

These great principles receive further confirmation in *Robertson v. Chapman,* 152 U. S. 673 (Its

official syllabus contains an admirable statement of the general doctrine.) The court says (p. 681):

"He could not directly or indirectly become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing his duty and his interest would come in conflict. * * * and this will be done upon the demand of the principal although it may not appear that the property at the time the agent formerly acquired it was worth more than he paid for it. The law will not in such case impose upon the principal the burden of proving that he was in fact injured."

In that case the agent was upheld in his repurchase for the following reason:

"That the defendant Pope *did not intend to conceal* the fact of his purchase is made clear by his letter of May 1, 1886, in which he notified the defendant that he had 'traded O'Donohue out of the property'." (p. 683).

Most carefully did the court guard the principles enunciated above, saying:

"Upon this ground the decree below can be sustained without impairing in any degree the rule that an agent will not be permitted to become the purchaser without the knowledge and consent of the principal." (pp. 682-3).

So far as *repurchase* here is concerned, neither Baker nor his company even alleges in answer that we had knowledge of that. It is of the things in our *complaint* that he says we had knowledge. (70, line 18). Now, our complaint never mentions repurchase, only the original sale in fraud *to* Simpson.

French v. Woodruff, 54 Pac. 1015 (Colo.) much resembles this. The executor sold the land to a

third party, from whom he subsequently took back conveyance, then got an order settling the estate and *discharging him.* After ten years' delay the beneficiaries recovered. Observe, after ten years.

"It may be full value was paid. But to permit such dealing opens the door to fraud and the law deems it the only safe way to put the trustee beyond temptation. * * * The beneficiary therefore at his election may have such a sale set aside or hold the trustee purchasing as still a trustee for his benefit *and may require an accounting of all advantages* that have accrued to the trustee from the sale *without any further showing than the mere face of the purchase during the continuance of the trust.*" (p. 1019 of the Reporter).

Wilson v. Brookshire, 25 N. E. 131 ..... Ind. .... also a strong case. An agent to collect and disburse moneys to pay a corporation's debts bought a judgment instead of satisfying it.

"By accepting the trust and entering upon its performance, Wilson assumed such a relation to the property in controversy that he became disqualified from acquiring any right in it hostile to those in whose behalf he was acting, without their consent, and this was so *whether he contemplated any fraud upon them or not.*"

The Washington Supreme Court of a purchase by an agent through a third party, says:

"It is of no consequence in such a case that no fraud was actually intended or that no advantage was in fact derived. The rule is not ..... remedial of wrong actually committed—it is intended to be preventive of wrong." *Hay v. Long,* ..... Wash., ..., March 25, 1914.

These self-purchases are, however, not void but voidable. They can be cured by silence in the cestui after knowledge unequivocally brought home. Cases upholding them on that ground are referred to under "Rules of Express Trusts Apply Here." (*post,* p. 62).

LACHES.

If the sale to Simpson was void, then not laches but only Statutes of Limitation can be considered.

If our contention that, because this asset was realty, it never was legally sold at all be correct, (*ante* p. 31), then laches is not involved, for the asset is still in the trust. Only statutes of limitation could be applicable. Now the Washintgon statuates cannot be invoked because neither Baker nor his voluntary transferees can set up *color of title* or *good faith.* In the lower court the statutes were apparently abandoned.

Rem. & Bal. §788: "Every person in actual open and notorious *possession* of lands or tenements under *claim and color* of title made in *good faith,* and who shall for seven successive years *continue in possession* and shall also during said time *pay all taxes,*" etc.

Rem. & Bal. §789: "Every person having *color* of title, made in *good faith,* to *vacant and unoccupied land,* and who shall pay *all taxes* legally assessed thereon for seven successive years," etc.

While seven years' tax payment has been pleaded here, no serious argument was made in the

lower court that Baker could come within the color of title and good faith requirements. *Seymour v. Dufur,* 53 Wash. 646; *McDowell v. Backham,* 72 Wash. 224; *Pettigrew v. Greenshields,* 61 Wash. 614;*Deffeback v. Hawke,* 115 U. S. 392; *Lindt v. Wiqlein,* 89 N. W. 226.

LACHES (a). *The Comptroller's Relation to a Receivership.*

Our opponents debate as if this were merely a controversy between them and the Comptroller. This is their first and persistent error. They are widely wrong. This is a controversy between Baker and his cestuis, the depositors.

We think the Comptroller's office showed actual diligence about Baker's affairs, but no matter. Neither negligence nor silence after actual knowledge in the Comptroller could have affected this case at all.

Laches must arise in the distributee, heir, or beneficiary, not in an officer having the duty to send him his share. Neglect by a comptroller would only add to the wrongs of depositors, not estop them.

For what is the Comptroller? He is himself a species of receiver. He alone determining without judicial inquiry whether the bank is insolvent, it is for his office to wind up its affairs. One of the instruments allowed him is a receiver. These he appoints without hearing and removes without

notice. "The receiver is the instrument of the comptroller." (*Kennedy v. Gibson*, 8 Wall. 498). To the Comptroller alone are the receiver's accounts transmitted. By him alone are they approved and passed upon without notice to creditors thousands of miles away.

"The receiver shall pay over all moneys so made to the treasurer of the United States and also make report to the Comptroller of all his acts and proceedings." (R. S. 5234).

Under the very general statute have come decisions distinguishing the relations of these two officers, and it is clear that while the Comptroller has a less intimate trust than the receiver, he also is a fiduciary.

The receiver, on the one hand, is "the owner of the title." *Bank v. Colby,* 21 Wall. 609; *Scott v. Armstrong,* 146 U. S. 499. He is "the statutory assignee," *Cockrill v. Abales,* 86 Fed. 505 (8th C. C. A.); *Yardley v. Clothier,* 51 Fed. 505 (3rd C. C. A.). He represents "the bank, its creditors and shareholders and not the government" (*Case v. Terrell,* 11 Wall. 199, 202), and has the right to bring suits even against directors for frauds (*Cockrill v. Abales*) without the authority of the Comptroller, "under the direction" of the Comptroller meaning merely subject to interference. *Turner v. Richardson,* 180 U. S. 87. While neither Comptroller nor receiver can make conveyance without the order of court, still the signature of a receiver to a conveyance might carry some presump-

tions, whereas the Comptroller's would be vain on its face.

Thus the estate is in the receiver, a permanent officer, freed from the frequent changes in the Comptroller's office, which has many other governmental functions.

The Comptroller, for his part, has certain active duties in the estate. All moneys that the receiver collects must be transmitted to the Comproller for distribution (R. S. 5234), and while the receiver can bring suits generally, he can bring none against stockholders without express direction. (*Kennedy v. Gibson supra, Bank v. Kennedy,* 84 U. S. 19). So, while the Comptroller cannot be said to represent the estate and the creditors in the sense that the receiver does, his connection with the properties is such that his right to purchase one of them for his own use would be intolerable.

But the receiver, being only "the instrument of the Comptroller," his appointment and removal without notice, the passing upon his accounts without opportunity of objection by interested parties, leaves it equally intolerable that the Comptroller should be permitted to allow his employee to do what he dare not do himself. Indeed, the receiver stands to the Comptroller very much as the bookkeeper J. B. Hill stood to Baker. Suppose a case. Suppose Hill had bought upon his own account from Baker some of these properties, nobody would think it right that he should be buying trust assets and it would be a poor defense if he should say that Baker

ought to have known that he, Hill, was the real purchaser, that Baker was negligent, etc. The reply would be, you were in the employment of the estate. You should either have bought nothing or have notified the creditors.

Another illustration. Suppose the receiver of a national bank in New York should blandly report to a comptroller. "I have today bought from the estate on my own account $500,000. par value St. Paul preferred at the enclosed price which I deem quite fair," and that the comptroller himself should write back express approval. Every court in the country would call it a gross violation of duty by both.

Our opponents are in a still less defensible position, since there was no confession by Baker even to the Comptroller, of saying that the Comptroller could give away the rights of creditors by mere inattention, by failing to suspect or by his clerk's pigeon-holing a confession. As for the creditors themselves, nobody will say they ought to have cognizance of accounts filed without notice in so distant and general an office.

But, it may be asked, How are these receivers to get good title when they buy from estates? First, let them buy nothing from the estates at all. Second, if they do, they can send out a postal card to everybody connected with the estate, announcing the exceptional thing of buying from their own trust, which mailing is done in judicial receiverships and in bankruptcy every day. However, we

think that, from the multiplicity of cestuis in bank receiverships, any asset—purchase at all by the receiver should be held not merely voidable but absolutely void. Public policy requires some such rule, the *cestuis que trustent* being so numerous that all expect some one else to do the work of vigilance and none with the keen interest of heirs or legatees. Nor is there any hearing upon accounts. The very behavior of Eckles in appointing as receiver a large debtor like Baker, and holding him there nearly three years against the protests of depositors and stockholders, affords food for reflection.

And so it is very clear that Baker must account directly to the cestuis to whose estate he was fiduciary and out of whose funds he received years of salary.

Accordingly, the only reason why we alleged that the Comptroller had no notice of this transaction of Baker was to increase the proofs of his secrecy. While we would not have been bound by anything he would have filed with a fellow fiduciary in so distant an office, we alleged his failure to file avowal even there, because that increased the proofs of his secrecy.

LACHES (b). *Our Opponent's Second Mistake.*

The whole defense here is not that we were informed of his act by a trust officer, but that we ought to have found out. Nobody was told, some-

body should have discovered. The answer itself avers nothing stronger. Baker on the stand did not so much as claim that he reported either an interest in '97 or a secret repurchase in '99. Nay more, admitting that he has owned this asset for fourteen years and always in some other name than his own, he contends that we ought to have found it out in spite of him.

Utterly ignoring the distinction between fiduciary and non-fiduciary relations, our opponents filed in the lower court a brief in which the obligation of a fiduciary to advise, and promptly advise, his cestuis of his trafficking in trust funds is nowhere mentioned, citing such cases as *Hardt v. Heidweyer* and *Wood v. Carpenter.* They quote emphatically from these without noticing that each of them, as well as all cases that rely on them, are pursuits of debtors' property by creditors into or through third persons or in other situations where nobody involved held a fiduciary relation to plaintiff or had any obligation to candor.

When they did cite fiduciary cases, they left out the most critical thing mentioned in them; they omit a fact in each *distinctly pointed out by the court,* that the defendant trustee had openly avowed his act, and that the laches discussed was not laches *to* discover, but laches *after* discovery.

For example, *Hammond v. Hopkins,* 143 U. S. 224. The court carefully says (p. 261) that the deeds by which the trustees purchased through one Chapman *showed* that they were intended for the

trustees themselves and were not false, and more, *"that the purchase was openly announced in the family,"* and that this openness was a distinguishing feature in that case was pointed out in the later case of *McIntire v. Pryor,* 173 U. S. 38, (which our opponents did not cite) where the court says:

"*Hammond v. Hopkins,* a leading case in this country, is not to the contrary. The transaction was *open and known* to all the cestuis and was objected to by none of them."

And so in *Patterson v. Hewitt,* 195 U. S. 309. The court on page 320 specifically notes the "open refusal" of the trustee to recognize plaintiff's right, and that the delay discussed is eight years' delay *after this refusal,* the court saying on page 321:

"The refusal of Hewitt to execute the deed of which both the appellants had notice was a distinct repudiation of the trust and opened the door to the defense of laches * * * As there was no evidence that defendant had fraudulently concealed the facts and abundant proof that the facts were known".

And the lower court here drew our opponents attention to the fact that the Supreme Court in *Robertson v. Chapman,* 152. U. S. 673, did on page 683 point out that the defendant agent "did not intend to conceal * * * he notified the defendant". In *Haywood v. Bank,* 96 U. S. 611, the Supreme Court distinctly says (p. 616) of the plaintiff complaining of a sale that 'he was promptly advised of it and of the amount realized."

Again, *Badger v. Badger,* 2 Wallace 87, at p. 93: "The whole transaction was public and well known to the widow and heirs and their guardians."

Hoyt v. Latham, 143 U. S. 533. One Barney, a trustee, having purchased for himself, the court notes (p. 569):

"There is absolutely nothing tending to show fraud or bad faith. * * * Barney * * * gave them apparently a satisfactory statement of the facts, requesting only that a decision be made at once."

Again, *Felix v. Patrick,* 145 U. S. 317. In that case there was no fiduciary relation at all. Land scrip of an Indian woman had been stolen, apparently, and with its powers of attorney turned over by some third person to the defendant Patrick. The court notes (p. 329) that there was no previous relation between Patrick and the Indian woman and that the relation between them was not fiduciary, but that his interest was "antagonistic" to hers from the start.

"He did not take them under an express trust to hold them for her benefit, in which case lapse of time would be immaterial, but under an implied or constructive trust."

The implied trust being that of a meddler's misappropriation the court finds that a person in her situation must of course be held to diligence. Moreover, it especially notices that the very complaint negatives its own allegations of concealment, as to which "no acts of his are averred in the bill, and we are left to infer that his conceal-

ment was that of mere silence, which is not enough. Indeed, his concealment is to a certain extent negatived by the fact that he put the power of attorney and deed upon record." (p. 331).

Norris v. Haggen, 173 U. S. 386, a fiduciary case in which the court again draws attention to actual knowledge.

"The statement that the complainant had only come to a knowledge of the alleged fraud within a short time before the filing of the bill was shown by the statement in the bill itself to be false and that he had known of the alleged fraud fifteen years."

So in *Nash v. Ingalls,* 101 Fed. 645, at p. 648:

"But here a distinct violation of the trust is alleged to have occurred as early as the beginning of 1878 and this is the ground of the suit. The injury occurred at that time and the cause of action immediately arose."

The violation there was refusal to pay plaintiff himself car rents under a trust agreement. So the court notes that plaintiff showed he had knowledge in 1878 and had waited after knowledge eighteen years before suit. Why do our opponents cite these cases? They are all cases of *actual* knowledge in the complainant.

For, the distinction is obvious in fiduciary cases when there is no actual notice in complainant. A member of this court had to apply it in *Sternfels v. Watson,* 139 Fed. 505. There a trustee violated his trust by making a mortgage. There was a foreclosure

ure sale and repeated purchases and transfers, all publicly recorded, including the wrongful mortgage itself. Laches being invoked after eight years because of these records, the court said:

"As to the defense of laches, it is sufficient to say that the trust was an express one, was never repudiated or denied by T. J. Watson otherwise than *constructively* by his mortgage on the property, and nothing came to the notice of Sternfels or Lake to show that the trust was denied or that others claimed to hold the property adversely. The law applicable to such a state of facts is expressed in *Speidel v. Henrici,* 120 U. S. 377."

This would answer our opponents even if a transfer to Baker in his own name had been of public record. We do not have to search the records, and we assume no constructive notice. He, on the other hand, has the duty to inform us, for the whole policy of the law is against his trafficking in trust assets. But the unreasonableness of our opponents' position is all the greater because there was never anything in Baker's name. *The Sternfels case is clearly right under Townsend v. Vanderwerker,* 160 U. S. 171. (*supra,* 60).

As to notice of public records, the broad distinction between non-fiduciary and fiduciary cases will be found in the exhaustive note to 22 L. R. A. (N. S.) p. 215.

Our opponents seem to think that the very sale in '97 to Simpson should start laches running against us, though it was apparently an honest sale of trust assets and more calculated to lull us asleep than to invite attack. This sort of reasoning is well

answered by Judge Lurton in the 6th Circuit Court of Appeals, *Newman v. Schwerin,* 109 Fed. 942. S., under a written agreement with plaintiff, had a right to buy at judicial sale and hold part in trust for plaintiff. The sale did occur but S. had a corporation, in which he owned only a portion of the stock, buy instead of himself, concealing that he had the stock interest. Plaintiff taking her share of the proceeds of the sale, S. argued that when she attacked it a year or more later, she should be estopped for not having investigated the sale. "She knew there was a sale." (Our appellants' argument here). But the court felt that this sale woul itself lull her asleep:

"She had, therefore, a right to suppose that the trust agreement between herself and Schwerin had become null and void by the purchase of the property by a third person. * * * It was Schwerin's duty to execute the trust according to its terms. If he bought the property for himself or had it bought in pursuance of a personal agreement which would defeat Mrs. Newman's plans for the preservation of her interests, it was his duty to have fully advised plaintiff, and *she was under no duty* under the circumstances to inquire before acting upon the truth of the assumptions of the decree of distribution. 2 Perry, Trusts, §§ 850, 851."

So in a fiduciary case the Supreme Court in *Kilbourn v. Sunderland,* 130 U. S. 505, says in reference to facts showing apparent delays of complainants after suspicious facts, that the complainants

"Reposing confidence in their agents, they may have neglected availing themselves of some

source of knowledge that they might have sought. The defendants cannot be allowed to say that complainants ought to have suspected them and are chargeable with what they might have found out upon inquiry aroused by such suspicion."

A scandalous doctrine indeed if a fiduciary should thus be permitted to conceal from his beneficiaries their cause of action while at the same time reckoning time against them, and put himself in a position to claim that he bought for himself by the very evidence that he had sold to another.

So our opponents, we say, have based their whole argument on the principles used by courts in non-fiduciary cases as to the complaining parties being put to diligence upon suspicion. Yet the very reason in such decisions shows that the Supreme Court never would apply it to a fiduciary instance. What is that language in the non-fiduciary cases like *Wood v. Carpenter*? That plaintiff should most particularly state, not only *when* he got the knowledge but how he got it. And why? So that the court can determine whether he could have learned sooner. Could have? This would impose a duty to investigate and act upon suspicion instead of the fiduciary's duty to inform. It would be utterly at war with the fiduciary doctrine. So of another reason for the non-fiduciary rule. "It is easy for you" to show when you got knowledge and "difficult for us." But it is not difficult for a defendant fiduciary to show the affirmative. That is part of his fundamental duty. He ought not to demand that plaintiffs show him when he per-

formed his own duty. (*Infra* "Burden of Proof in Laches.")

These are the errors which counsel have got into by quoting creditors' suits like *Wood v. Carpenter.* The Supreme Court never would follow such a rule, never has followed such a rule, in fiduciary cases. Moreover, they have twice criticised *Wood v. Carpenter.* In *Rosenthal v. Walker,* 111 U .S. 185, distinct criticism was thrown on that case, adverting to the fact that it had overlooked the former decision of *Bailey v. Glover,* (21 Wallace 342). Very shortly afterwards (in *Traer v. Clews,* 115 U. S 528), the court again commented on this error in *Wood v. Carpenter,* and has made it very plain that even in creditors' suits, it is not necessary to state *how* you came by your knowledge.

Is a fiduciary to take a trust asset in secret and then debate whether this straw or that should be reckoned knowledge in those he is trying to deceive? Imagine the plight of beneficiaries. They must promptly attack him on every trifling suspicion or be forever estopped. Surely they run such risks. But the law would not make it incumbent on beneficiaries to work inharmoniously and suspiciously with their own trustee. Let him avow and the thing is simple.

In *Pence v. Langdon,* 99 U. S. 578, one Langdon in Minnesota bought stock in San Francisco through Pence. The fiduciary relation is made clear by the Supreme Court, whch says (p. 580):

"Properly construed we think the letters show clearly the agency of Pence as claimed by Langdon."

Though the delay was only one year, it was as important as twenty in a case like the present, for the subject was fluctuating mining shares sold by the agent to the principal. Every day in rescinding would be important, a year long indeed. Upon whom, then, rested the burden of proving that the principal had notice and when he got it? Our opponents, applying language from non-fiduciary cases, would say, "It is easy for you to say when you first learned, and difficult for me," etc. This was not the reasoning of the Supreme Court, which said:

"The burden of proving knowledge of the fraud and the time of its discovery rests upon the defendant." (p. 582).

Yet this is exactly the same set of judges (for the cases were only a year or two apart) which decided the non-fiduciary case of *Wood v. Carpenter.* The latter case does not cite the *Pence* case, and there was no reason why it should.

And some time before the latter the Supreme Court had held the same in a case where years had passed and both parties were dead. *Seymour v. Freer,* 8 Wall. 202. One Freer under written contract became Seymour's agent to purchase lands, the title going to Seymour, who was to have five years to make the sales before dividing. "To this extent Seymour was the trustee and Freer

the cestui." More than five years passed, the property was not divided, and Seymour died. The court had to consider three hypotheses as to what, if either of the parties were living, would have been testified to:

"The devisees [of the trustee, Seymour] might have held the property and denied that under the circumstances the trust subsisted any longer. If Freer acquiesced his rights would have been at an end.

"~~Pence~~ Freer might also have expressly or tacitly abandoned his claim. This would have worked the same result. * * *.

* * * "Both parties might have concluded to continue their existing relations and to wait for a more auspicious period. * * *

"*The burden of proof as to the two former rests upon the appellants*" [the devisees of Seymour ,the trustee]."

So in *Bacon v. Rives,* 106 U. S. 99, which was a demurrer to a bill alleging investments by decedent twelve years before as plaintiff's agent, the court says on page 106:

"*We cannot* upon the case made by the bill *fix the date.* * * * Being called upon to execute what consistently with the facts as disclosed in the bill appears to be a subsisting trust, or if it had been in whole or in part executed, to disclose when and how it was so executed, he should not be permitted to take shelter behind a demurrer which relies simply upon the statutory limitations and confesses that he has kept his *cestuis que trustent* in ignorance of what it was his duty to communicate."

The policy of the law is not to make cestuis suspicious of their fiduciaries or to provoke dissensions and petty lawsuits among them upon dubious circumstances which the cestuis must either act upon or be forever shut out by, but to put upon the fiduciary a simple obligation to speak out.

Courts excuse beneficiaries from acting upon suspicions. Thus, in *Krohn v. Williamson,* 62 Fed. 869, Judge Taft says (p. 876):

"It is quite true that Krohn suspected he was not being fairly dealt with * * * but I do not see that Krohn's suspicions of Nelson's fair dealing and a settlement based on them at all relieved Nelson of the duty to disclose everything. It did not put the parties at arm's length. The trust relation continued."

And in the famous case of *Michoud v. Girod* (ante p. 39), the court mentions on page 560 *the suspicions which the heirs entertained* of the executors. During these very suspicions they made settlements with the executors, whose frauds, nevertheless, they were allowed to overturn after 30 years. It clearly holds that a beneficiary suspecting has indeed the right, but is not under the necessity, to sue.

Nor was the *Michoud* case stronger than *Oliver v. Piatt,* 3 Howard 333, a case of ingenious fraud by the trustees. The court on page 411 says:

"There may have been unjustifiable sales and gross inattention on the part of some of the proprietors, but as against persons cognizant of the trust it can furnish no ground for any denial of the relief which the case otherwise requires."

And in *Townsend v. Vanderwerker,* 160 U. S. 171, a delay of nine years was sustained. Though it was proved that a deed of trust had been put of record by the trustees, showing (as in *Sternfels v. Watson, supra*) dealings with the property inconsistent with his obligation, the beneficiaries were excused from vigilance concerning the public record.

And so in *Pence v. Langdon, supra.* Pence in commenting on the mining shares he had sold to Langdon, used language which he contended ought to have put upon Langdon the duty of investigation. The claim was that Pence the agent in San Francisco had sold Langdon in Minnesota his (Pence's) own shares and concealed that fact. Now Pence used these words in one of his letters, "after the 7500 shares of stock I sold you," but the lower court's comment on this (which the Supreme Court said (p. 581) was "exactly right,") was that Langdon "might, in view of previous friendly relations, have no suspicions of bad faith and might naturally regard expressions as inaccurately used rather than put upon them a construction which would show bad faith on the part of the defendant."

That we should be investigating our own fiduciary istead of his confessing is part of a theory of our acquiescing. If acquiescence, then, be their claim, the burden of proof in that also is upon them. *Pence v. Langdon, supra; Seymour v. Freer, supra; Miles v. Wheeler,* 43 Ills. 123; *Cooley v. Gilliam,* 102 Pac. 1090 (Kas.); *French v. Wood-*

ruff, 54 Pac. 1015 (Fla.); *Freeland v. Wyman,* 119 S. W. 560 (Mo. 1909); *Japhet v. Pullen,* 133 S. W. 441 (Tex.); *Faust v. Hosford,* 93 N. W. 58 (Iowa); *Fitzgerald v. Fitzgerald Co.,* 62 N. W. 899 (Neb.); *Anderson v. Northrop,* 12 So. 318 (Fla.).

Moreover, since the Federal Courts in applying laches to land suits often compare rules under statutes of limitation, and the interpretation of local statute, it is proper to note *Stearns v. Hochbrunn,* 24 Wash. 206, where in a suit against an *agent's* fraud it is held sufficient to allege when the fraud was discovered "without negativing the idea that it could have been discovered sooner."

And as to the burden of proof, the same court has just held:

"The burden is on the agent to show that the principal had knowledge * * * and that having such knowledge he consented." *Hay v. Long,* 78 Wash. ....., March 25, 1914.

Nor is the mere fact that a date may be uncertain sufficient to transfer the burden. *Bacon v. Rives supra.* And in the leading case of *Oliver v. Piatt,* 3 Howard at page 411, the court says:

"At what particular period the subsequent rights of Baum, Oliver and Williams first became known to the plaintiff or the other proprietors of the Piatt and Port Lawrence Companies having the same interest, *does not distinctly appear,* but the facts could not have been fully known or understood until within a few years before the filing of the bill and at most probably not exceeding eight or ten. That period, upon admitted princi-

ples, is far too short to interpose any positive bar to relief in equity."

LACHES (c). *The Rules of Express Trusts Apply Here.*

A national bank receiver is not like the ordinary receiver or like a director in a corporation or guardian or agent, all of whom have control without title. This receiver has according to the Supreme Court "the title to the property" and is often referred to as a "statutory assignee." (ante p. 45). His duties are expressly regulated by statute, R. S. 5234, and in conjunction with the title make him clearly an express trustee.

His fiduciary character is of course most obvious. In purchasing any of the property he would be either wholly excluded or judged by the severest rule. Wrongdoing of that sort is forbidden to "every kind of fiduciary relation. The principle is the same in all of them. Assignees of bankrupts' or insolvents' estates are subject to the same rule, whether appointed by courts and by operation of law, or by voluntary assignment." 1 Perry Trusts, §209.

Even where a receiver has no title, it is the same:

"Doescher as receiver was not strictly a trustee because the legal title was not vested in him as receiver, yet occupied a fiduciary relation * * * and the equitable doctrine of trusts was applicable

to him." *Donohue v. Quackenbush,* ..... Minn. ..... ,77 N. W. 430.

Probably no officers have so many opportunities to filch as receivers of national banks. The assets are peculiarly liquid and mutable. Their acts are not subject to approval nor are their accounts submitted to creditors.

As to laches invoked by express trustees, the following doctrine is universally approved:

"Time begins to run against a trust as soon as it is *openly disavowed* by the trustee, as insisting upon an adverse right and interest which is clearly and *unequivocally made known* to the *cestui que trust." Speidel v. Henrici,* 120 U. S. 377."

Nor could Baker here improve his position by saying that when he purchased trust property he converted himself into a constructive trustee.

"In the case of an implied or constructive trust, *unless there has been a fraudulent concealment of the cause of action,* lapse of time is as complete a bar in equity as in law." *Speidel v. Henrici, supra.*

The language we have underlined is an exception always enforced. If it were not enforced, fiduciary trustees would gain an advantage over their beneficiaries without their consent, and as they are not permitted to gain any pecuniary advantage without such consent they will not be allowed to improve their legal relation either.

Thus in *Newman v. Schwerin,* 109 Fed. *supra,* Judge Lurton was not at the pains to decide whether Schwerin had converted himself into a

constructive, or remained an express, trustee. The result was the same. He had not informed his beneficiary and she was under no obligation to investigate.

When, therefore, we hear more liberal doctrines occasionally mentioned of constructive trustees, the latter are persons who became constructive trustees without previous fiduciary relation, or else express trustees who have openly announced their purchase. In the latter instance they remain constructive trustees during a period allowed the other side to object to the act. It is only fair to call them such then, because whatever they are doing is not concealed. But the express trustee who conceals is trying to get the advantage of doctrines applicable to constructive trustees, while so far as his beneficiaries can see, he has not changed his relation of express trustee. Of course there are many kinds of constructive trustees, and some of these are not fiduciary at all; so cases upon this point have to be scrutinized somewhat.

As Perry says of them, 1 Perry *Trusts,* §167:

"The courts are agreed in administering the same remedies in certain classes of frauds as are administered in fraudulent purchases of trusts, and as courts and the profession have agreed in calling such frauds constructive trusts, there can be no misapprehension in continuing the same phraseology."

And again in §195:

"The trustee must not deal with the property for his own benefit; so where the trustee in selling

property to a third person stipulates that the buyer is to sell it afterwards to the trustee, and the agreement is carried out, the trustees still holds as trustee and not by independent title. * * * The trustee must clear the transaction of every shadow of suspicion."

Until the fiduciary does his part, inform and avow the purchase, laches is really not in the case. Notice the felicitous way of expressing it in *Patterson v. Hewitt,* 195 U. S. 310: "The refusal * * was a distinct repudiation of the trust * * which *opened the door* to the defense of laches."

Until repudiation avowed there was no laches to discuss. Perhaps this idea may be clearer by our saying that *it takes two parties to make a sale by a trustee to himself,* the trustee *and* the beneficiaries. Their acquiescence is just as necessary as his signature and until knowledge is brought home to them there is no sale or acquiescence to discuss. From very extraordinary delays, forty to fifty years in some cases, acquiescence has been presumed, but Judge Putnam, recognizing this, was of opinion that "fifteen years" was much too short for that. *Wood v. Perkins,* 57 Fed. at 261.

LACHES (d). *Rule in "Actual Fraud Proved."*

Laches is for the most part used by courts in doubtful cases. Against proved fraud it is only a bar where the notoriety of avowal is too great to be ignored, and *in addition* defendant has spent time

and money upon the property, not in secret, but *openly on the faith* of such notoriety.

By "proved" we do not merely mean "found against" by the lower court but proved by facts which any court would say must remain unchanged by any probable proof; and when against proved fraud the court considers laches at all, it adopts a rule so liberal as practically to do away with laches. The Supreme Court itself avows this distinction.

For laches is a policy, *first,* to compensate for loss of evidence; *second,* to protect improvements made or sums spent in the belief that the other parties have abandoned their claims. But when a defendant, as here, confesses fraud and yet invokes laches, the court says: Is it you that complain of lost witnesses? Absurd! It is plaintiff whose case has been made harder by that, for you have admitted the wrongdoing. You have had nothing to lose in witnesses. Their death, if anything, has been of value to you, who confess. Or is it mere lapse of time that you complain of? This was valuable rather than disadvantageous to you. It might have enabled you to escape. You almost did escape. Now that you have confessed, it is the true owners who have been damaged by delay, not you. But you complain that you have spent money or put improvements on the property. Well, was this done while you were hiding your title? If so, you were then hiding the right of the other people to sue you, and presumptively they would have sued you, a fiduciary, if you had

avowed. You shall not improve people out of their property without their knowledge. Or possibly you complain that the property has increased in value? Has it so increased since you avowed ownership or while you concealed ownership? If you had been an honest man, you would never have had this property at all, or if you had not taken great pains to conceal your dishonesty, the other people presumptively would have taken it away from you before it got all this value that you talk about.

The object of judicial inquiry is the ascertainment of truth. When truth is confessed or overwhelmingly proved by facts obviously not affected by time, rules intended to protect defendants in cases of doubt must give way.

So in *McIntire v. Pryor,* 173 U. S. 38, the court says (p. 54):

"We have no desire to qualify in any way the long line of cases in this court, too numerous even for citation, n which we have held that where the fraud is constructive, or is proved by no conclusive testimony, or by evidence falling short of conviction, and the property is greatly increased in value, great diligence will be required in the assertion of plaintiff's rights. But these were all cases either of bills to establish a trust or open settled accounts, bills not involving fraud or where the fraud was not clearly proved, or where with knowledge of the facts the fraud had been deliberately acquiesced in, bills to impeach judicial proceedings, or where property had passed into the hands of persons innocent of fraud or with no actual notice that a fraud had been committed.

"Granting all that may be fairly claimed in these cases, there is another class having a different bearing, in which it has been held that in cases of *actual fraud,* a delay even greater than that permitted by the statute of limitations was not fatal to the plaintiff's claim. The leading case is that of *Michoud v. Girod,* 4 Howard 503, which was a case of actual fraud committed by trustees of real estate against their *cestui que* trust. A bill filed 36 years after the commission of the fraud was held not to have been too late."

The *Michoud* case is very famous. A third person bought at a fairly conducted judicial sale. Later the executors repurchased. It was held that the price paid by the purchaser was nominal. Thirty-six years passed, during which sales of part (525) of the property were had. Toward the last the executors even went into possession (525) and the suit was brought against *their heirs!* Receipts and acquittances had been given by the heirs, and it was conceded that they had long been suspicious. The detailed facts preceding the opinion are most interesting, and the opinion of the court was decisive, notwithstanding some difficulties in accounting. It was said:

"*In a case of actual fraud,* we believe no case can be found in the books in which a court of equity has refused to grant relief within the lifetime of either of the parties upon whom the fraud is proved, or within thirty years after it has been discovered or become known." (also *supra,* 39).

In the *McIntire* case the fraud was upon an ignorant person, but what will be said of *Saxlehner v. Eisner Co.,* 179 U. S. 19. There the court was met

with laches as to two features claimed to be infringed in a patent suit. One was the use of the word "Hunyadi." As to that they held Saxlehner barred by twenty-five years' acquiescence in an apparently general appropriation of the name. The other question was on the use of a label. Now Saxlehner, a man of large business affairs in Hungary, was accustomed to watch his rights in various countries. It was on this very account that he was defeated as to the word "Hunyadi," and even as to the label, the court conceded it had been "ten years" in use in the United States, but says:

"*But in cases of actual fraud,* as we have repeatedly held, notably in the recent case of *McIntire v. Pryor,* 173 U. S. 38, the principle of laches has but an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim. We have only to refer to the cases analyzed in that opinion for this distinguishng principle, that where actual fraud is proved, the court will look with much indulgence upon circumstances tending to excuse the plaintiff from a prompt assertion of his rights. In the case of an active and continuing fraud like this, we should be satisfied with no evidence of laches that did not amount to proof of assent or acquiescence."

In *Hammond v. Hopkins,* the fiduciary case discussed supra in which, as we have noted, the court protected the trustee because he had "openly announced in the family" his purchase and thus started laches, the court did not dissent from the doctrines of *Michoud v. Girod,* but distinguishing it said, "but there was actual fraud in that case."

And so Judge McPherson, in *Stanwood v. Wishard,* 134 Fed. 959, citing the *Michoud* case, and declining to apply in a fiduciary instance the doctrine of the creditors case of *Wood v. Carpenter,* says:

"The case of *McIntire v. Pryor,* 173 U. S. 38, collects the cases that conclude all discussion that as against an actual fraud and as against one perpetrating the fraud when acting in a representative and trust capacity, the period of the statute of limitations is largely if not wholly immaterial."

He speaks of "statute of limitations," but the suit was in equity and the defense laches, with the usual comparative doctrines invoked from the statute.

The Turner and Rotch Testimony.

The repurchase in '99 along with its concealment is, of course, actual fraud by confession. But the fraud antedated that. The lower court here found a fraudulent understanding in '97. The presumptions were irresistible, even without Simpson's admissions to Turner and Rotch. (143, 133 and p. 29, *supra*).

A word, however, as to these. While defendant resists them, he, of course, concedes that admissions against title by one's dead grantor are an exception to the hearsay rule, and permissible because they are admissions against his interest. This is everywhere the law and clearly so in Washington (*Corbett v. Weaver,* 59 Wash. 248; 2 Wig-

more, evidence sec. 1458; *Reese v. Murnan,* 5 Wash. 573), but, says he, upon your, plaintiff's, theory, Simpson never had any real interest. It was actually Baker's and so, he argues, the rule falls with the reason for it. We do not agree that the reason falls. The reason is not so narrow. If the rule does not apply to an instance like this, then Baker can take advantage of his own wrong, putting the property in Simpson's name to hide ownership, but not to admit truth. But surely a man who puts title in another for a fraudulent purpose is estopped to deny that man's confessions. Upon theory this must be correct, for why does the law permit the admissions in an ordinary case? It is because the holder of the title is not presumed to have said anything to injure what he possessed. But is he not also presumed not to utter that which injures his character or exposes him to liability? As a man will not wish to hurt his title, so he will not wish to admit something that may expose him to civil or criminal action. When he does admit that, it is as presumptively true as an admission against title.

Now we were assuming our opponent's premises to be correct, that the admissions of Simpson were made after the secret *repurchase* of '99. But before that time, according to Baker, the property was really Simpson's. Hence on his theory, admissions in that period would be relevant. Now Turner fixes one of the conversations in 1898.

LACHES (e). *There must be changes distinctly prejudicial to defendant when he invokes laches.*

Even in the non-fiduciary case of *Galliher v. Cadwell,* 145 U. S. 368, Justice Brewer, in defining laches, did not put it upon the vulgar theory of mere lapse of time or lack of diligence, but of some equity built up in the defendant, saying:

"On the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in the porper forum; *that by reason of his delay the adverse party has good reason to believe* that all those rights are worthless or *have been abandoned;* and that because of the changed conditions or relations during this period of delay it would be an injustice to the later to permit him to now assert them."

Observe three things: Knowledge by plaintiff, secondly *defendant's belief* that the claim is abandoned, then the changed conditions. Defendant in a word builds up no equity in himself, if, putting on his improvements, he does it under a secret ownership, believing himself not discovered. If he has any equities, it is plain he has not been relying upon them.

And in another non-fiduciary case this court said, *London & San Francisco Bank v. Dexter Horton & Co.,* 126 Fed. 601:

"No hard and fast rule has been laid down. * * * One principle pervades all cases. * * * Not only must there be a seemingly unnecessary delay * * * but that by reason of some change in the condition or relations of the property or parties occurring during the period of delay, it

would be inequitable to permit the claim of plaintiff to be enforced."

If these doctrines pertain in non-fiduciary cases, how much more vigorous must they be in the fiduciary cases, and this last we have seen in such instances as *Michoud v. Girod.*

So in *Brainerd v. Buck,* 184 U. S. 99. Plaintiff in 1879 sent money to Brainerd which was invested in land in Brainerd's name instead of plaintiff's. In 1880 plaintiff learned of this, but acquiesced because he supposed that the land would be given to his (plaintiff's) sister under a will that Brainerd had already made. After Brainerd's death in 1880, plaintiff's sister, living at a distance and supposing that she had title, conveyed her supposed ownership to plaintiff, but in 1897 the heirs of Brainerd brought ejectment against plaintiff, whose sister had not inherited at all. Then plaintiff in 1898 filed his bill to establish a trust. Here was a delay of eighteen years after Brainerd's death; but more, it was a delay with knowledge, for plaintiff knew that in 1879 Brainerd had wrongfully put the property in his own name, at the very outset. He had, accordingly, no other excuse than a belief that his own sister would inherit from Brainerd and thus square the transaction. Held not laches, because the ejectment suit was the first notice to plaintiff that the land had not been devised to his sister. But our opponents would on such a state of facts make a vigorous protest, saying that for eighteen years this man had acquiesced with

knowledge of the original wrong, tardily changing his mind when he found that his sister was not the heir. The Supreme Court, however, took a different view of his situation because there were no innocent investors and there was no reason why those who had done a wrong should not ultimately right it.

To the same effect *McIntire v. Pryor,* already cited, 173, U. S. 38. The suit was to set aside a foreclosure. There was nine years' delay after the foreclosure before suit and four years' delay after the fraud was actually discovered, but it did not appear that anybody would be prejudiced by the restoration of rights.

Similar cases are *Hudson v. Cahoon,* 91 S. W. 72 Ind., 10 years' delay; *Harvey v. Hand,* 95 N. E. 1020 Ind., 12 years' delay; *Chamberlin v. Chamberlin,* 95 Pac. 658 (Cal.), exact duration of delay uncertain; *Roush v. Griffiths,* 69 S. E. 168 (W. Va.), 14 years' delay; *Mullen v. Walton,* 39 So. (Ala.), 27 years' delay; *Wright v. Wright,* 89 N. E. 789, 40 years' delay; *Pearson v. Treadwell,* 61 N. E. 44 (Mass.), 8 years' delay; *in re Boney's Estate,* 75 Atl. 1061 (Pa.), 32 years' delay.

Laches (f). *There Are No Prejudicial Changes Here.*

The circumstances are five which a court reckons: Improvements, deaths, innocent purchasers, difficulty of accounting, increase in value.

Improvements. None here. The land has never risen above the tide until the state's contractor filled it *during this suit.* (185 .....). In taxes only has Baker spent anything, a few thousand dollars ordered refunded. This is not a case where stockholders have made heavy investments, or where people have built homes, or where the defendant himself has squandered his life's efforts.

Deaths. In nearly a third of the cases of fraud concealed some party or other is noted as dead. In the *Saxlehner* case (ante), it was uselessly urged that Saxlehner, if alive, would admit that he had never mentioned his adverse rights, nay had refused personally to sue. In *Townsend v. Vanderwerker* (ante), a party to the agreement was dead. "Only a circumstance," says the Supreme Court, "not a controlling thing." So in the *Michoud* case conspicuously. In *Seymour v. Freer,* 8 Wallace 202 (post), both parties had long been dead. In *Bacon v. Rives,* 106 U. S. 99, the trustee had long passed away.

How idle to complain that Simpson is not alive. Baker has confessed, not indeed the original fraud of 1897, but the secret purchase of '99, itself a fraud or the worst badge of an earlier one. Would they have Simpson deny Baker's railroad letter? Baker cannot say: "I bought years after the receivership, and you are now, Simpson being dead, trying to place upon me a purchase during that receivership." No, he confesses the creation of a secret trust during that receivership.

But were Simpson alive and denying the fraud of '97, would not a court smile? "You bought the asset from Baker both below a fair market estimate and below what the receiver had lately paid? Then sold back while he was still receiver, at mere cost and interest, notwithstanding a rise in value? Agreed to carry it in secret for him when that officer was indebted to the trust itself!"

Moreover, while the defendant whimpers at the loss of Simpson, he does not call others available, Hardin, Brockett, Meacham, or give any reason, when asked, why he does not. The presumption is they would testify against him. (Ante p. 28).

Innocent Purchasers. The distribution of stock is seen at Rec. 179-180. Surely Norton will not be deemed innocent and his holding is but 3 per cent. As to the few who have received presents of one to five shares each, these are purchasers without consideration. Nor has the divorced wife chosen to interpose here, doubtless secured by the other collateral, and, it may be, deeming it well to keep out of a case in which she might have to admit cautions from Baker that the least said about this property the better. Whatever her reasons, she is compelled, like the other shareholders, to accept her stock with whatever title this company had, which cannot be superior to that of its fraudulent organizer. *Wilson Coal Co. v. U. S.,* 188 Fed. 545; *Lynn & Lane Company v. U. S.,* 196 Fed. 593, both from this court.

Difficulty of Accounting. Never was case so simple as this when we consider the accounting in *Michoud v. Girod* after twenty-nine years of suspicion and the death of one of the executors, an accounting decreed in spite of partial sales, improvements, and what not. Baker is to be handed back simply his taxes and the sums paid to the State.

Increase of Value. This is the last circumstance which equity will consider to protect a fiduciary. If this of itself barred relief to those he has wronged, he would indeed have a premium for industrious concealment. (See "Rule in Express Trusts Applies Here" and "Actual Fraud Proved.")

No case can be found in which a court has allowed this circumstance *alone* to decide a fiduciary case. Search as you may, you will find always one of the other four "altered conditions" added to this or else "doubtful proof." As where a court says there are innocent purchasers here *and* the property has increased, etc.; or the proof is doubtful *and;* or there are great improvements here *and,* etc.

No court has been bold enough in a fiduciary case to say: "Yes, you have defrauded these people, but the property has gone up so much in value that we shall let you keep it, though that is the only thing that has changed."

LACHES (g). *Sundry Circumstances Relied On By Defendants as Starting Laches Here.*

The following facts are pointed to by the defense, upon their erroneous theory that it is our duty to ferret out fraud in a fiduciary:

1. *The Sale in 1897 to Simpson.* If this itself ought to start laches, then every time a trust officer sells an asset to a third person, the thing must be then attacked or subsequently discovered grounds are lost. On the face of the sale to Simpson there was nothing to indicate an interest in Baker, which is the object of the present suit. *Newman v. Schwerin,* 109 Fed. 945, is conclusive on this.

2. *The Wing Examination in* 1898. This occurring while Baker, still receiver, was an employee of the Comptroller, no laches or ratification by that superior could bind the creditors. (Ante p. 44).

But let us suppose it could. Why, say they, you were suspicious in '98! Why did you not find out, why did you not go from this person to that until you discovered the truth? The instant reply is, Why did you not tell us the truth when, according to this story, you had the chance? That was your duty. Instead of Wing's not discovering anything being a reproach to us, his attempt to find something, if he did attempt, is commendable in the then comptroller.

But see the absurdity at the start. Defendant states that there was no purchase until after 1898, that he had no interest till 1899 (besides which Simpson never transferred at all until 1905). If, then, defendant's own story be true, there was in 1898 no fraud to discover and this Wing incident is valueless to both sides; or if the fraud, as we contend, already existed, then the greatest badge of it, the repurchase, was wanting when Wing appeared. Again, if Baker already had an interest, then he violated his duty in not telling Wing about it. Baker naturally does not claim that he told Wing anything of the sort. That position he could not take because he says he had yet no interest.

Even if the creditors were bound by negligence in Baker's employer, the Comptroller, we would say that in this Wing incident there was no proof of any such negligence, for the Comptroller was endeavoring to get information, which was defeated or not supplied.

They argue that Wing ought to have discovered, not only what they say did not then exist, but what the defendant did not confess then and has since denied down to his first false answer in this case. A likelihood, indeed, that even if Wing had suspected an interest of Baker's in the Simpson purchase, he could have got the truth! Can anything else be imagined than that Simpson would have denied as vigorously as Baker has ever since denied? In *Cunningham v. Pettigrew,* 169 Fed.

335, at page 343, the 8th Circuit Court of Appeals answered a reasoning like the foregoing:

"It is said Pettigrew ought to have inquired of Cunningham, Hyde and Fox or some of them concerning the fraud, and that his failure to do so was negligence on his part. It seems to us that the unreasonableness of expecting those men, who were the perpetrators of the fraud, to voluntarily give self-inculpating evidence excused any effort to induce them to do so. Their personal interests, strongest of human motives, impelled them not to do so, and any attempt to secure from them information which would necessarily expose them to civil liability, at least, for their wrongful conduct would, in our opinion, be not only an unreasonable requirement, but one which might have thwarted any ultimate discovery. In such circumstances we cannot regard the failure to do so as fatal laches."

Our opinion, though, is that Wing never examined, and his attention was never drawn to this particular transaction. The story rests on Baker's word alone and he gives a very meager account of what they now make important. This was no part of our case. It was theirs. Did Wing ever file a report on such a subject? If so, surely it was for them to produce it. The copies could be had for the asking. They have introduced much else of the Comptroller's files, and they did not need any deposition from that office to get this, for Revised Statutes 884 is extremely liberal about this Department's documents: (Infra also pp. 86-7).

"And all copies of papers in his office, certified by him and authenticated by the said seal, shall be in all cases evidence equally with the original."

Moreover, in his answer, defendant Baker said nothing about an examination by any particular officer. That he was reserving, we suppose, for a surprise. Perceiving Wing not there to confront him, he selected him as a sort of ratifier out of the various contemporary officials. Observe that while Baker himself would have us believe that Wing had a direct errand about this business, nothing of that kind is sworn to by J. B. Hill, his bookkeeper (216-238), yet nobody can doubt for a moment that a person on Wing's supposed errand would have strictly interrogated the bookkeeper about what he knew of this transaction, about Simpson, about the value of the land, about the relations between Simpson and Baker. Yet not one word to this effect by Hill, Baker's witness. Indeed, Hill will not say that he even showed Wing this particular land. He speaks of showing him the "real estate that *remained unsold*" (230).

3. *Judge Frater,* Baker's first successor, it is said, ought to have found out things. Let us see. He succeeded Baker in April, '99, and remained active receiver until 1901 (168). From then until February, 1913, when Schofield was appointed and this suit begun, the receivership was dormant. Frater meanwhile had become a Superior Judge, and in 1907, eight years after Baker's resignation, he granted a divorce to Baker's wife on her complaint of desertion (defendant's Ex. X., and 212). Now, it is argued that because in this divorce some of Baker's stock in the Seattle Water Front Realty

Company, along with much other collateral, was allowed to the wife, Frater ought to have recalled the events of years before, ought to have seen through a great many things, ought to have acted upon them. He ought to have seen, it is said, not only that this company owned tide lands, but that it got them from Baker, and more, that Baker got them himself during his receivership and not after his receivership, and that these lands must have been lands that belonged to the Merchants' National Bank!

A preposterous argument fortunately not left to assumption, for Judge Frater says he never knew in the divorce case what assets the company had (167), and it is not asserted by the other side that anybody advised him. The divorce decree (Defendant's Ex. X.) is very general, the adjustment of property rights being "made between themselves" (212).

Diligence, indeed, is invoked here by one who could have settled all these questions by common frankness and honesty.

4. *Norton's Recorded Title.* It is even argued as follows: Norton at least put a conveyance of public record from the State in 1905, and Norton had been known to Judge Frater back in '99 and 1900, when Frater was an active receiver, as having done work for the bank in the East. Therefore, say they, when the deed went on record to Norton, Judge Frater should have known of this

fact among the hundred thousand instruments annually recorded in King County. Nay, more, he should not only have noticed this conveyance, but he should have recalled the Norton of years before, then have felt that Norton had dishonestly come by some property. Nothing, let it be remembered, was of record showing any connection between Baker and this property. It was not even on the public records from Simpson to Norton, only from the State to Norton. The Federal Supreme Court has disposed of the duty of notice in respect to such an instrument, even if it had been in Baker's own name. *Townsend v. Vanderwerker, supra.*

5. *The Brockett Correspondence,* 1905. We think we have shown, *ante* p. 19, that this correspondence, so far from indicating public facts to put anybody on notice, actually shows the care taken by Baker's lawyers to conceal his connection with this block.

All these clews now pointed to by our opponents as constituting in themselves notice to us lack a necessary premise. Nothing had occurred before these to make anybody look for clews or recognize a clew if he happened to see it. Baker, in other words, had never done anything in his own name. These trifles are, accordingly, as irrelevant as they might be in the following illustration: I am informed today, by a friend, we shall say, that an agent of mine some years ago cheated me in a piece of property at Spokane. I immediately

bring suit. Then the defendant blandly says to me: "Why, if you had gone to the Land Office at Spokane you might have found a letter from a lawyer of mine, in which, though he did not mentoin my name, he was discussing the buying of this property, and that would have set you a-thinking," etc., etc. But I reply: "Why should I have gone to the Land Office at Spokane at all? I had no reason to suspect you. You were not so much as carrying the property in your own name. You now ask me to consider something as known to me which would make me search for clews."

This Brockett correspondence, so far from furnishing argument against us, does, by its careful suppression of Baker's name, make argument against him.

(h). *Burden of Proof in Laches.*

We assume our opponents driven to the burden of proof in respect to acquiescence or laches, but they seem to confuse themselves as follows: Your bill shows knowledge as of some time before the beginning of this suit. Now, when did you get it?

Our first reply is that until he has shown repudiation, laches is not involved in this case, that it is not for him to say I will discuss the *bona fides* when you explain delay, for part of the *bona fides* is his advising us of what he did, and he is not to circumvent that duty by challenging at the outset a delay which, even had it existed for sixten whole

years, would be innocent enough unless with knowledge. Such knowledge in us it would be his duty to establish.

But if there was any burden upon us, we thought we fully discharged that, as follows: Baker's successor, Frater, is the one who Baker will claim ought to have acted. (We assume he must say Frater rather than the Comptroller, for had he actually made a clean breast to Frater, he would be very indignant if we were to argue now that that does not help him, and that he should have advised the *Comptroller.*) Frater then, with the title and trust in him, is the one who, Baker must claim, represented the creditors for the purposes of laches. Now Judge Frater testified distinctly that he never had any intimation of Baker's interest in Block 430 (167-8), though he had had a good deal to do with Baker in the transfer of assets. This officer we think entirely purged himself of notice. Now Frater was receiver down to the appointment of Schofield, just before this suit. That leaves only Schofield's term to be accounted for. As to Schofield, we put in no testimony, for we confess knowledge during that period—about a month. If, therefore, any testimony was required from us in advance, we think we more than complied with it, and that it was shifted to Baker to show either that Frater spoke untruthfully or that some other officer, if any such were qualified to affect creditors by knowledge, received it. Yet Baker, whose duty it was affirmatively to advise

us, and who, far from advising us, confesses active concealment, would now have this court both disregard the testimony of Frater, and go the whole doubt against us who have been wronged, that is to say, assume that we have known *all* these facts *all* of sixteen years.

See also p. 137

Even were this court uncertain as to the date of knowledge acquired by us, it would not resolve doubts against us, (ante, 58 bottom, 61 bottom).

Baker, having wronged this estate both as its debtor and as its trustee, is hard indeed to please. He has done everything that equity abhors but claims the very utmost that equity has to bestow, liberty to deal in trust funds, liberty to hide them, liberty to file an untruthful answer, liberty to change it, liberty to maintain evasive insufficient and contradictory pleadings, liberty to have all doubts resolved in his favor.

And his counsel knew well that upon him devolved the burden of showing notice in us. This they set out to take the deposition of Comptroller Kane and have printed (73) an interlocutory ruling of the lower court striking out certain interrogatroies propounded to him. They did *not* print those that the court permitted. Instead of taking the deposition they dropped it, though allowed to ask Mr. Kane the following, to which we made no objection: (Original Stipulation, this court).

1. State your name, residence and occupation.

2. If you reply that you are connected with the office of the Comptroller of the Currency, state

your official position and how long you have been identified with that office and the various positions you have officially occupied.

3. As such acting Comptroller are you the custodian of all the books, records and files belonging to the Comptroller's office?

4. *When were you first acquainted with the claim* which is now made by John W. Schofield as receiver as set forth in the foregoing suit?

5. Who appointed John W. Schofield as receiver of the Merchants' National Bank?

After leading us to suppose they would take the testimony they suddenly dropped it just before the trial. Similar questions were permitted to be asked also of Schofield by deposition. He appeared at the trial and testified, as the record discloses, but our opponents propounded him no questions on such heads.

(i). *The Answer Here on Laches.*

The answers proceed on the theory not of notice given by the fiduciary, but of negligence to discover. Even as to the latter they are inconsistent and evasive.

Baker's answer. (30) His paragraph XII., *answering ours of the same number*:

"Defendant denies that the purchase [by whom? *Simpson or Norton or Baker or Realty Company?*] of said tide land Block 430 and said lease was made without the knowledge of the Comp-

troller, and denies that the assignment [*to whom? from Baker to Simpson or t oNorton?*] of the same was made without the knowledge of the Comptroller of the Currency, but avers that the Comptroller of the Currency had full knowledge of the situation, both in law and fact, relating to the claim of said insolvent bank to the right to purchase said land, and that all acts done and performed by this defendant pertaining to the same [*What is meant by "the same," the right to purchase, or the lands themselves, or the assignment?*] while this defendant remained receiver, were with the full knowledge of said Comptroller and were done and performed with his approval [*knowledge and approval by the Comptroller of the secret repurchase and hiding of that asset?*] * * * Denies that he individually or as receiver has performed any act contrary to equity or good conscience, but avers that all of his acts while receiver were for the sole and exclusive benefit of his trust and were performed in good faith, with the full knowledge of the officers of the United States having supervision of his trust." [*"All his acts." This was pleaded before he had shifted and had admitted by amendment the repurchase while receiver. That act he admits in his testimony, was entirely secret.*]

The Company answers as follows, after denials of concealment, etc. (70):

"But avers that plaintiff, or his predecessors in interest, knew or had means of knowing, for more than three years prior to the commencement

of this action, to-wit, since January, 1897, all the facts known to him now [*"Facts." But he has already denied many of our facts. What, then, does he mean to say was actually known to us?*] and that plaintiff is therefore barred by the statute of limitations. (70) * * * This defendant avers that all the facts in said *bill of complaint* [not "in this answer"] set forth and all matters connected with said receivership, and all deaings with reference to said Block 430, of Seattle Tide Lands, and the harbor lease adjacent thereto, and the method of handling the same, [*Everything mentioned except "dealings" is an official act. Dealings cannot mean his own secret act, for see "advice and direction" following*] were matters known to the Comptroller of the Currency and were conducted under and pursuant to his advice and direction. [*Notice "in the complaint" also Comptroller's "advice and direction." Our complaint alleged no repurchase, only the original fraud.*] in addition to which the same were matters of public record, open to the world, and the same state of facts which now exist and form the basis of the allegation in said *bill of complaint* have existed at all times since the Merchants' National Bank of Seattle was placed in the hands of a receiver, and could and would have been discovered and made known to any one investigating the same or investigating or inquiring into the doings and affairs of said receivership." (70)

How easy to have said, had he dared, that he did put the thing in Simpson's name for himself

at the outset and that we knew of it. He could not allege *actual* knowledge of the *original* fraud because he denies there was any. As to that secret he attempts to plead, and evasively pleads, a defense not permitted to a fiduciary still concealing, indirect or constructive knowledge on our part, knowledge presumed from suspicious facts. So much for the affairs of '97. As to the *repurchase* in '99, he alleges neither kind of knowledge.

Two things immediately strike our attention. First, *inconsistency.* Is he now allowed to say (or does he actually say), after denying there was any fraud in '97, that we knew of it and could have attacked? And this question would arise, no matter whether or not he had pleaded subsequent repurchase. Second, there is *no full and fair statement* of just what he means to say we *did* know. The answers are sham and evasive.

The inconsistencies we have pointed out above, as well as the lack of frankness and certainty, are not captiously adverted to by us. On the contrary, they are pointed to because some of them arise from the very shifting of Baker after the discovery of the railway letter, the others from a deliberate purpose not to allege anything pointedly and directly at all.

Now, if ever there was a case in which an honest man could have made a direct, positive and unvarying disclosure of his position from start to finish, it was this: As to mere amounts paid he might differ, as to a month here or there he might

differ, but as to his positively informing us, he would not be in doubt, and he would not be saying also that a thing had never been held in trust when in point of fact it had been held six years at least in trust.

Such answers as these are not tolerated in a court of equity. The following authorities will suffice:

Newman v. Schwerin, 109 Fed. 942, which we have used several times in this case, is again in point. There the purchasing company, in which the trustee had a secret interest, set up rights as an innocent purchaser. It relied on language set out on page 945 in detail by Judge Lurton, in his statement of the facts. That language is fully as definite as any employed by the defendants in this case. It was "that complainants Newman and wife were advised immediately after the sale of the fact that said lands had not been purchased by defendant Morris Schwerin, but by the Central Land & Coal Company. They also knew and insisted at that time that said defendant was interested in the Central Land & Coal Company," etc. But the court was not satisfied with this and says:

"The defense of innocent purchasers for value and in good faith is a defense which must be explicitly made by plea or answer. Notice should be denied in the fullest and clearest manner. Pom. Eq. Jur. 784, 785; High v. Batte, 10 Yerg. 335; Smitheal v. Gray, 1 Humph. 491; 34 Am. Dec. 34,664; Harris v. Smith, 98 Tenn. 294, 39 S. W. 343; Boone v. Chiles, 10 Peters 176. The answer of the Central Land & Coal Company contains no

such defense. The references in the answer of that company to the contract between Messrs. Newman and Morris Schwerin are indefinite and evasive. *Notice of that agreement should have been denied in the fullest and clearest manner, as well as of all circumstances referred to in the bill from which notice might be inferred, and the answer should include all those particulars* which are necessary to constitute a bona fide purchaser. Pom. Eq. Jur. §785. The answer is grossly defective in all that is necessary for the proper making of such a defense."

Several things are noticeable about the answers here. First, the different defendants do not plead the same things. Second, they contradict each other, because when amendments were making at the trial, some paragraphs were left unamended, defendants leaving themselves in a position to claim two theories of defense. Third, they all omit allegations of notice given and rely only on "that knowledge could have been acquired." Fourth, they leave us uncertain as to which transaction this knowledge could have been acquired, whether of the original fraud as alleged by us or of the repurchase as alleged by them.

The untruthfulness of the answers on the facts of purchase and secret trust. See pp.2 *et seq., supra.*

"NO POWER TO ACQUIRE BLOCK 430."

We have not yet seen our opponent's brief, but in the lower court they argued as follows: The bank and its receiver had no right to contract with

the State for these tide lands. The whole transaction was so *ultra vires* that even if Baker dealt fraudulently against his trust, he should be permitted to keep them.

The court surely will not take kindly to this mode of escape. It was Baker himself who advised the Comptroller, not only that he had this right of purchase, but that it was "a valuable asset" (98). Upon this recomendation trust money went into the purchase and Baker is today, through his company, owner of a trust asset.

If the objection is argued by our opponents on the ground that it is a contract rather than a purchase and that the contract obligated the receiver to do something that might survive his receivership, the objection is but academical because, as the original contract shows (bottom of 107), it is assignable, and so assignable that if the State accepts assignment, it permits a novation just as we see that in the assignment actually made (108-9) Simpson, when he succeeded to this contract, covenanted actively to keep its conditions. Baker even in recommending the contract to the Comptroller mentioned the assignability, and the Comptroller in ratifying the contract had said:

"Inasmuch as the contracts are assignable, they can no doubt be disposed of to advantage at any time should such a course seem advisable." (99)

So, it is not worth while to argue what the legal status is of a contract by a receiver which, let

us suppose, would obligate him to build a ten-story house and put on one story every year, a contract obligating him to a long course of disbursement without relief or substitution. Whatever may be thought of an engagement like that, it affords no illustration of the one under consideration.

For not only was this contract assignable in terms with relief from obligation, but the testimony shows that the contract would have value like a deed without regard to the balance due upon it. Whether, then, it be considered as either the making of a contract or the purchase of land, it was something for all practical purposes without permanent obligation. It could be resold the next day.

We have said before that ownership of tide lands under contracts long before State patent is earned, is a property right of great value in Wash ington. It carries with it immediate possession, and in this particular instance this land, from the day that Baker bought it by contract, rose steadily in value.

However, the argument of our opponents seemed to be directed not so much against contract as against land purchase. The thing was void, they argue, not so much because of its liabilities, but because it was something which he could not hold.

Now, why not hold? If they argue that it was outside his trust to buy real estate, then they must admit that if he had a piece of property surrounded by property which he did not own and through which it was of vital importance to get a right of

way, he would have no right to buy such right of way. Innumerable must be the occasions on which business prudence in a receivership will require the buying of some additional piece of property. The receiver of arid lands might thus be unable to buy lands adjoining containing springs. It is a queston of discretion, a question to be settled "under the direction of the Comptroller" (R. S. 5234). To us it seems plain that the very nature of a tide land preference right makes its own argument here. One has upland property. Between that upland and the sea lies other property. The upland property is made very much more valuable if you acquire the lower. Would you have a right to abandon it and not make anything out of it, even aside from the value given to the upland by the frontage? *Our argument is that this was an occasion when the receiver had to decide not whether he would acquire, but whether he would abandon, an asset.* Not to have entered into the contract with the State would have been for this trust practically to have given away a valuable piece of property. There is no other way to look at it. The prices paid to the State were purely nominal.

Is it argued, then, that it was the business of the Comptroller and this receiver to give away assets, when by paying a paltry $148.00, the one-tenth, they got a piece of property immediately of much greater value and ever afterwards rising in value, valuable in addition to the increased value which it gave to the upland behind it?

The expenditure in buying this asset was the prevention of waste. It was like a receiver's putting repairs on a piece of property or paying up arrears of taexs on dubious lands. We have no hesitation in saying that the Department and Baker would have been extremely reprehensible if, for want of a payment of $148.00 on these twelve acres of tide lands, they had suffered that right to pass away.

Cases are cited by our opponents under this head that seem to us to have no application. One, of which they seem disposed to make much, is *Case, Receiver, v. Kelly,* 133 U. S. 21, immediately distinguishable and yet the only one cited with any bearing on the present. Officers of a railroad had certain lands given to them, with the intention that they be turned over to the railway company later, the road being then in construction. They kept the lands. The company never had title to them, and it was proved, as a matter of law, that the company never could have taken title to them. Moreover, not one dollar of the railroad company's money ever went into those lands. This distinction alone eliminates the citation. Not for one moment would the Supreme Court have held that if the company had put some of its own funds into those lands, the officers could have appropriated them. Thus in the substantial elements of trust and fraud, an element was lacking there which is present here, and in the purely legal and technical aspect, another element is here which was not there. This element was that in that case the title never had been in the railroad.

It never had gotten further than the names of the officers who were expected to turn it over to the railroad.

Here the contract was not only paid for in trust funds ("admits that the said amount was paid from the funds in his hands as receiver," 23), but was taken *in the name* of the Merchants' National Bank. (104) In the case cited the court was asked to propel the property forward into a company which had no legal right to acquire it and which had spent nothing to get it. Here the court is asked to let a trust officer keep a piece of property which his trust paid for and which he has gotten away from it.

And the general principles of estoppel apply against Baker here.

"A trustee cannot be heard to say, 'I will not carry out the trust because the parties had no legal right to repose the trust in me." *Cowan v. Hearst,* 83 N. W. 274 Mich.

"A trustee is estopped to question the legality of the contract by which he acquires property when called to an account by the cestui que trust." *McMicken v. Perrin,* 59 U. S. 507.

"Where a national bank, though restricted by statute not to acquire real estate, does acquire it, it is good against everybody except the government." *Union National Bank v. Matthews v. Matthews,* 98 U. S. 621.

"So when a loan is made by a national bank in violation of the statute, it is only the government that can question it." *Bank of Lowell v. Butler,* 323 N. E. 909.

"The purchase of stock for speculative purposes by a national bank clearly in contravention of its charter is good against everybody except the government." 172 Fed. 846.

"And generally the doing of acts prohibited by the national banking act is, when done by them, good nevertheless until attacked by the government itself." *Thompson v. St. Nicholas National Bank,* 146 U. S. 240.

Barron v. McKinnon, 196 Fed. 933 C. C. A. 1st Cir. (1912). The receiver of insolvent national bank sought to recover the purchase price of shares of stock sold by the bank to defendant. The bank had purchased them from one M. The defense was that the purchase from M. being *ultra vires,* the bank had no title and conveyed none to defendant and that therefore the consideration for the defendant's promise to pay failed. Held: Though the purchase was ultra vires and the transaction voidable, the bank obtained and conveyed good title.

A similar result was reached by the Circuit Court of Appeals of the Second Circuit, in two cases arising out of this same transaction:

Metropolitan Trust Co. v. McKinnon, 172 Fed. 846;

Morse v. U. S., 174 Fed. 539, 551.

Kerfoot v. Farmers' & Merchants' Bank, 218 U. S. 281. One Kerfoot conveyed to the defendant national bank real property in trust to be conveyed to certain grantees, which conveyance was made. This is an action by heir of grantor to set aside these conveyances. Held: Though this transac-

tion was ultra vires of the bank, title passed by these conveyances; *that only the sovereign can object.* The court says, p. 1043, that:

"This trust should not be permitted to fail and the property to be diverted from those for whom it was intended by treating the conveyance of the bank as a nullity in the absence of a clear statement of legislative intent that it should be so regarded."

To the same effect are

Smith v. Sheeley, 12 Wallace 358, 20 Law Ed. 430 (bank organized under invalid statute. Held: Good conduit of title.)

Fritz v. Palmer, 132 U. S. 282, 10 Supr. Ct. 93.

The leading case is *Union Natl. Bank v. Matthews,* 98 U. S. 621, 25 Lawyers' Ed. 188 (1878), (National bank may enforce real estate mortgage).

National Bank v. Whitney, 103 U. S. 99, 26 Lawyers' Ed. 443 (1891), (same point).

See also *Emigh v. Earling,* 115 N. W. 128, 27, L. R. A. N. S. 243 Wis. (1909), (national bank conducting a creamery, held liable for debts incurred therein). Affirmed 218 U. S. 27, 54 Lawyers' Ed. 915.

"NO POWER TO REIMBURSE BAKER."

They argued that Baker ought to escape, even if guilty, on the ground that the receiver has no power to make him the reimbursement. The rea-

son why the receiver has no such power is, they say, because he possesses no funds.

This is certainly an agreeable argument to wrongdoers. Many a receiver is in charge for the express purpose of pursuing such people and yet has no immediate funds, and many a receiver happens to be without funds when in the ordinary operation of receivership he discovers such a fraud. In what way the wrongdoer is entitled to complain we do not see. If he is adjudged not guilty of the wrong, he has been harmed in only a trifling degree by the privilege given the receiver to have his rights adjudged. If, on the other hand, he is adjudged guilty and yet the receiver afterwards cannot raise the money to comply with the reimbursement condition, then the wrongdoer is luckier than ever because he is both adjudged guilty and escapes.

And Baker is exceedingly lucky in the conditions actually imposed by the lower court. We ought not, in point of fact, to pay him back anything at all. A strong line of authority makes it doubtful whether, where a trustee has been guilty of *actual fraud,* his expenditures upon the property are to be repaid. We in this instance, however, could take no chances, for it was possible that the court might decide that Baker was not guilty of wrongdoing intentionally, but merely that there never was a legal sale *to* Simpson. Now, of course, the testimony has left no doubt of the actual fraud and the lower court has found actual fraud, so we might have omitted reimbursements in the decree.

Yet even in this appeal we felt it safer for the depositors that we maintain our willingness to reimburse. Baker then, we say, is lucky. He will now get back with six per cent. interest, by the decree (82), what he has expended upon this property, $8,130.19, plus $2,846.94 interest; not a bad investment for a wrongdoer.

We presume that no contest will be made against the legal status of the present Receiver Schofield. The certificate of his appointment (Plf's Ex. 1) is controlling. (*Sanger v. Upton,* 91 U. S. 45, 59; *Cadle v. Baker,* 20 Wallace 650). Judge Frater never received any discharge and only gave in his resignation just before this suit was commenced (166). The Department wisely refrains from granting formal discharges of these receivers, because additional assets often turn up in these estates (190). Frater therefore resigned a month before this suit was commenced. Schofield was appointed to succeed him. It is universal law that a receivership continues until there is a formal discharge (*Alderson on Receivers,* pp. 894 and 887; *High on Receivers,* 2d Ed. §834) just as in private estates the filing of final accounts by executors is not a termination. (*Denny v. Sayward,* 10 Wash. 422, 431; *Re Estate of Hood,* 98 N. Y. 363; *Whetstone v. McQueen,* 34 So. 229; 2 *Werner on Administrations,* §572; *Fountain v. Mills,* 36 S. E. 428.

ADDENDUM No. 1.

FINAL OPINION OF LOWER COURT.

[In the transcript as ordered (344) our opponents called only for a "memo decision" rendered by the lower court on an interlocutory matter (73). We accordingly print ourselves the *final* opinion on which rests the decree. Printed also in 212 Fed. 504. We have italicised portions and inserted some comment.]

"In June, 1895, the defendant Baker was appointed receiver of the Merchants' National Bank of Seattle, in which capacity he served until April, 1899, when he was succeeded by A. W. Frater, who served until February, 1913, at which time the plaintiff was appointed as receiver. At the time of the failure of the Merchants' National Bank, it was the riparian owner of certain lands, and as such upland owner had the preference right under the laws of Washington to purchase certain tide lands, particularly the land in issue in this case, known as Block 430. The receiver, with the approval of the comptroller of the currency, purchased from the State of Washington the said tide lands, and the usual contract was executed by the State and defendant Baker, providing that the payment be made in ten equal installments, payable annually, which contract provided upon payment in full of the consideration named in said contract the State of Washington would issue to the Mer-

cahnts' National Bank or its assignees deeds in fee simple to said tide lands. The complaint alleges that Baker while acting as receiver purported to convey and assign the said contract to Sol G. Simpson on the 26th day of November, 1897; and alleges in substance that defendant Baker and Sol G. Simpson entered into a scheme to defraud the estate by turning Blocks 429 and 430 over to Simpson, with a secret agreement that Simpson was to hold Block 430 for the use and benefit of Baker; that the assignment to Simpson by Baker was to Baker's own use and benefit, and without authority of law and was for the purpose of secretly defrauding the bank, and that at all the times that Simpson held the title to said block it was held in trust for Baker and subject to his control and direction; and that thereafter the said property was transferred by Simpson through mean conveyances at Baker's suggestion to the Seattle Water Front Realty Company, a corporation, promoted by defendant Baker, and of which he is the owner of practically all of the stock; that at the time said block was transferred by Simpson in 1905 it was reasonably worth $100,000 and is now worth $300,000; and the bill prays that the court determine what, if any moneys, have been expended upon the property involved in this suit, and that this be repaid to the defendant Baker, and the property held as property to the trust.

"The defendant denies all the allegations of fraud and all secret dealing, and also denies the

right and power of the receiver to make the tide land purchase, and sets up the inability of the plaintiff to do equity, and the laches of the plaintiff.

"Defendant further contends that on the 6th day of October, 1897, the *defendant Baker obtained an order from* the Circuit Court of the United States *for the sale of all* doubtful bills receivable, overdrafts, stocks, bonds, securities, etc., and that an order was entered by the court authorizing the sale at private sale of such assets; that thereafter he, as receiver, sold to Sol. G. Simpson tide land Blocks 429 and 430 for the sum of money which he had paid to the State and $50 profit upon each block; that thereafter on or about March, 1899, he repurchased from Sol G. Simpson Block 430, paying the amount of money which Simpson had advanced on account of said Block, together with taxes and interest, and requested Simpson to retain the title to the said property in his name for the reason that he, Baker, was involved and desired to hide the property from his creditors; that the title to the property was carried in Simpson's name until 1905, when it was transferred to Norton of New York, who held the title for defendant Baker until the orgnaization of the defendant corporation, when it was transferred by defendant Norton to the defendant corporation. The other facts sufficiently appear in the opinion.

NETERER, District Judge.

"The defendant contends first, that the preference right to purchase tide lands given to riparian

owners is not a vested right nor a right which could be exercised by the receiver of a national bank. This contention, I think, is definitely disposed of by the State of Washington Supreme Court in the case of Allen v. Forrest, 8 Wash. 700, where the right granted by the legislature is confirmed as against the world except the state prior to the exercise of the option, and becomes a vested right after the exercise of the option by the riparian owner, as will be later shown.

"It becomes important in determining the issue here whether the preference right thus given a riparian owner is personal and chattel property or real estate. *In the order of court, under which* it is claimed the land in issue was sold, the receiver was authorized and empowerd to "compromise, compound or sell at private sale all assets of said insolvent bank, consisting of bills receivable, judgments, overdrafts, stocks, warrants, securities, assessments upon the stockholders of said bank, all other personal property and chattel property and evidences of indebtedness." The order is concise, clear and certain. (*Record page* 19.) If the interest of the bank's receiver in the tide lands is real estate, it would not be comprehended by the order, and the receiver could not under such an order make the sale.

"The powers of the comptroller of the currency and the receiver are defined by act of Congress, Sec. 5234, Rev. St., which provides:

"Such receiver under the direction of the comptroller of the currency * * * upon the order of a court of record of competent jurisdiction * * * may sell all the real estate and personal property * * *."

"To make any sale of assets of a defunct bank an order of a court of record of competent jurisdiction is essential. The receiver cannot sell the real or personal property of the bank without an order of the court, and a sale which is not authorized by an order of court of competent jurisdiction is void. or personal property of the bank without an order

Ellis v. Lytle, 27 Kas. 707, Am. Rep. 424;
Richardson v. Turner, 52 La. 1613;
Toullot v. Booker, 160 S. W. 293.
[*See also our citations on p.* 32 *ante*]

"A reading of the order of sale is conclusive of the fact that the receiver was limited to a sale of personal and chattel property. *No real estate is comprehended either in the* petition for or order of sale. Personal and chattel property is a thing movable, which may be annexed to and is attendant on the person of the owner and carried about with him from one part of the world to another. 2 Bla. Com. 14.

"Real property has been defined as an interest which a man has in land. 32 Cyc. 662.

"It sometimes is difficult to determine what is personal and what real property, yet where proptetry has been defined as real property by the state court such holding should be adopted by this court.

"In Washington Iron Works v. King County, 20 Wash. 150, appellants had purchased under contract certain tide lands in the City of Seattle, paying one-tenth of the purchase price and covenanted to pay the balance in ten equal annual payments pursuant to a similar contract as in evidence in this case. The assessor of King County assessed the land as real estate, and suit was brought to enjoin the collection of the taxes. The Supreme Court at page 153 said:

"In equity, appellants are the owners, possessing a real and substantial interest, which they can transfer, assign and dispose of as they choose; and the State cannot deprive them of this right. The term 'property' as applied to land, comprehends every species of title, inchoate or complete."

"In State ex rel. Wilson v. Grays Harbor & Puget Sound Railroad Co., 60 Wash, 32, at page 34, the Supreme Court of Wshington says:

"There is a distinction between the granting of a privilege which may or may not be exercised and the exercise of that privilege by the person upon whom it has been conferred. In the one case, the State merely confers a right, the acceptance of which is optional. In the other, the option has been exercised and the faith and credit of the State has become involved in its fulfillment."

" It was there held that the preference right of a riparian owner to tide lands is an interest in land and subject to condemnation for railroad right of way. The Supreme Court of Washington in State ex rel. Trimble v. Superior Court, 31 Wash. 445, speaking of tide lands purchased under similar contract, at page 455, says:

"The interest of the relators is, to say the least, an interest in land, and as such may be taken for a public use by condemnation, upon payment of just compensation therefor."

"In State v. Frost, 25 Wash. 134, speaking of State school lands held under a similar contract of purchase, the court said:

"This is such an interest in land that may be sold for taxes."

"In Hotchkin v. Bussell, 46 Wash. 7, the Supreme Court of Washington holds that tide lands held under contract under Sec. 6750, Rem. & Bal. Code, descends directly to the heirs, subject only to the debts of the deceased.

"It appears as a conclusive fact, when the phraseology of the order is considered together with the action of the court and conduct of the receiver with relation to similar property in this trust, the holding of the Supreme Court of Washington that tide land held as was the land in issue was real estate after the exercise of the option to purchase by a riparian owner, and that the sale of land was not contemplated by the order entered.

"It is further contended by the defendants that the receiver acquired nothing by the contract of purchase from the State; that the receiver and comptroller of the currency acted without authority in the securing of the contract from the State, and that their act in so doing was ultra vires. Sec. 5137, U. S. Comp. Stat. 1901, is cited in support of this contention. This section provides:

"A national banking association may purchase, hold and convey real estate for the following purposes, and for no others:

"First. Such as shall be necessary for its accommodation in the transaction of its business.

"Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

"Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages held by the associtaion, or shall purchase to secure debts due to it.

"But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

"The powers of the receiver of a national bank are defined by the following sections of the Revised Statutes:

"5234. Such rceiver, under the direction of the comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it, and upon the order of a court of record of competent jurisdiction, may sell or compound all bad or doubtful debts, and on a like order, may sell all the real and personal property of such association, on such terms as the court shall direct."

"5236. From time to time * * * the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction

or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated."

"Act of March 29, 1886 (p. 3514 of U. S. Comp. Stats.), provides:

"That whenever the receiver * * * shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property real or personal, by reason of any bond, mortgage, assignment or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the comptroller of the currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale."

"An examination of these sections of the statute appears to be conclusive of the fact that there is no merit in the contention of the defendant. It must be assumed in the absence of a contrary showing that the ownership of the upland by the bank was authorized. The ownership of the upland carried with it a valuable privilege which was a part and appurtenant to the upland, of which privilege the receiver could avail himself by making certain payments assessed by the State, in the way of appraisals of the value of the land. These assessments or payments covered a period of ten years.

Not only did the receiver have the power under these sections of the Revised Statutes to exercise this privilege, and protect the security for which the upland was held by the bank, but it was his duty to do so. Even though a doubt existed as to the right of the bank to acquire the tide land, the receiver could not be heard to challenge such right. This holding on the part of the receiver would be good as against the world except the government.

Union National Bank v. Matthews, 98 U. S. 621;

McMichen v. Perrin, 59 U. S. 507;

National Bank v. Whitney, 103 U. S. 99;

Cowen v. Hurst, 83 N. W. 274 (Mich.);

Thompson v. St. Nicholas Nat'l Bank, 146 U. S. 240.

"The tide land being lawfully obtained, and being rightfully in the possession of the receiver, it is contended on the part of the plaintiff that the attempted sale of the tide land to Simpson was without authority, and the re-purchase of this land by the defendant Baker in March, 1899, as contended, re-invested the trust with this property, even though the prior sale had been made in good faith, and was duly authorized by order of court, and it is strongly urged that it is the duty of the trustee to exercise all of his powers and faculties in the interest of and for the benefit of the trust, and that he could not be a seller and a buyer at the same time, and on becoming re-invested with the equitable title during his receivership, the policy of

the law would not permit it to be other than a trust transaction.

"It has always been the policy of the law, as it is administered in courts of equity, to remove as far as possible from persons acting in a trust relation, all temptation with a view of not only having the trust administered justly, but also to have it administered in such a way that not only will justice be done, but that the public may know that justice is being done. Hence a person acting as a trustee has not been permitted to be interested in any transaction which in any way would be incompatible with his best services for the cestui que trust. "Equity will not permit trust property to be reconveyed to the trustee before his duties as trustee are ended for the same consideration for which it was sold. Sound policy requires all the skill and effort of the trustee to be used for the benefit of the *cestui que* trust."

Boynton v. Brastow, 53 Me. 362.

"To the same effect is *Michoud v. Girod,* 4 How-503; Creveling v. Fritz, 34 N. J. Eq. 34; Toustelot v .Booker, 160 S. W. 293 (Tex.). Courts have held that where an administrator sold land, and while he was yet administrator became an owner of some of the property sold for the same consideration, this dissipates his defense of good faith.

Haullihan v. Fogarty, 127 N. W. 793;

Guerrero v. Balerino, 48 Cal. 118;

Winter v. Truax, 49 N. W. 604.

"Much reliance is placed by defendant Baker on Robertson v. Chapman, 152 U. S. 673. The court at page 681 says:

"He could not, directly or indirectly, become the purchaser and maintain any title thus acquired as against his principal; for, in so purchasing, his duty and his interest would come in conflict. If an agent to sell effects a sale to himself, under the cover of the name of another person, he becomes, in respect to the property, a trustee for the principal, and, at the election of the latter, seasonably made, will be compelled to surrender it, or, if he has disposed of it to a bona fide purchaser, to account not only for its real value, but for any profit realized by him on such resale. And this will be done upon the demand of the principal, although it may not appear that the property, at the time the agent fraudulently acquired it, was worth more than he paid for it. The law will not, in such case, impose upon the principal the burden of proving that he was, in fact, injured, and will only inquire whether the agent has been unfaithful in the discharge of his duty. While his agency continues, he must act, in the matter of such agency solely with reference to the interests of his principal. The law will not permit him, without the knowledge or assent of his principal, to occupy a position in which he will be tempted not to do the best he may for the principal."

"In that case the agent did report the purchase. On page 683 the court says:

"That the defendant Polk did not intend to conceal the fact of his purchase, is made clear by his letter of May 1, 1886, in which he informed the plaintiff that he had 'traded O'Donohoe out of the property.' "

"In the instant case the principal was never notified and information was suppressed even from the general public.

"The testimony in this case shows that the transfer of the contract to purchase Blocks 429 and 430 from the defendant Baker as receiver to Mr. Simpson was a private transaction between the parties and was made in October, 1897. Baker's receivership ended in April, 1899. May 9, 1904, Baker wrote the following letter to Mr. Reed, the agent of Simpson:

"May 9, '04.

"Mr. Mark Reed, Seattle.

"Dear Sir: I had a talk with Mr. Simpson in S. F. about the tide land which he holds in trust for me. I asked him if he would take my note in settlement of the advances he has made, together with the interest accrued thereon. The first 2 or 3 payments I made myself. Mr. Simpson's books, however, will show the status of the account. There is one more payment due next March to complete the contract with the State. Mr. S. stated that you held his general power of attorney and would assign the certificate back to me or my order. I wish you would compile a statement of the account I owe to Mr. Simpson and send same to Chicago, and I will send you from there a form of assignment to execute, together with note for the account, due 1 year after date, which plan Mr. S. consented to and will doubtless advise you to that effect.

"I may be away several months, and I may have occasion to use the item, or to dispose of it, and so I think it had better be put in the shape indicated.

"My address will be as below.

"Yours very truly,

"Chas H. Baker,

"Auditorium Annex, "Chicago.

"I believe there is an item to my credit also of a certain sum for right of way across the tract sold to the N. P."

"Baker subsequently paid to Simpson all moneys paid by Simpson on account of Block 430. The title to this block was thereupon transferred to Baker's New York attorney in 1905. Baker subsequently promoted the Seattle Water Front Realty Company, and Block 430 was conveyed to it in full payment of its capital stock, $250,000. Baker was not a party to the incorporation, nor was he at any time an officer or trustee. He has during all of the time owned 95 per cent. of the stock. The other five per cent. was held by friends. *Baker at no time was known to the public as being in any way interested in said tide lands, nor was the plaintiff or his predecessor advised that defendant Baker claimed any interest in said lot. No one connected with the trust, so far as the evidence shows, knew anything about Baker's interest in this land until about the time of bringing this action.*

"In March, 1899, about the time that Baker claims to have purchased from Simpson Block 430 for the moneys actually expended by Simpson for said block, William Pigott, on behalf of his company, purchased [*actually only a part*] Block 431, which is less valuable than Block 430, for $1,750. In December, 1899, Pigott for his concern purchased Blocks 441, 442, 443, 444, and part of Blocks 429 and 432 for $5,000 cash. He endeavored to purchase Lots 430 and saw defendant Baker, who

referred him to Simpson. He saw Simpson, who said there were others interested in the block, but finally made a price of $30,000 for Block 430. These negotiations covered a period of "about two or three years," commencing in March, 1899. The value of Block 430 ,the land in issue, at the time the defendant Baker claims to have purchased from Simpson [*for about $400.00*] was from $5,000 to $15,000. Simpson told Turner some time during the year of 1898-99 that "those lands belong to Charley Baker, that he was carrying the title for him to accommodate him," and also made a statement to Mr. Roche, his private secretary, and to Mr. Reed, his son-in-law, who was acting as his attorney in fact, that he held the title to the lands for the defendant Baker. *There is no doubt in my mind from the evidence presented here that there was a condition of mind between Baker and Simpson,* express or otherwise, which was that Baker should have Block 430. Where the relation of the parties, the value of the land, and all of the circumstances as disclosed by the evidence is analyzed and applied, together with the suppression of the ownership of defendant Baker, the conclusion is inevitable. (See Reed, Rec. p. 78.)

"It is next contended that the plaintiff is guilty of laches and should not be permitted to prosecute this action. I do not think that his suggestion has any force under the evidence of this case. *Lapse of time* is no bar and laches cannot be asserted until knowledge is brought home to the plaintiff or such

notorious condition or relation to the property in issue by the defendant, that the plaintiff should have known, and *such condition is not disclosed by the evidence.*

Michoud v. Girod, 4 How. 503;
Russell v. Huntington, 162 Fed. 868;
Prevost v. Gratz, 6 Wheat, 481;
Townsend v. Vanderwerker, 160 U. S. 171.

"Finally, it is asserted that innocent purchasers for value are involved, and that the plaintiff cannot do equity, and the court must leave the parties where it found them.

"The testimony shows that all of the stock was paid by transferring the tide land in issue. The parties who subsequently acquired stock stand in no better position than Baker, through whose subscription and transfer of the land the stock was acquired. Equity will be fully compensated by paying to the defendant Baker or Seattle Water Front Realty Company all moneys paid on account of the purchase of said land and all taxes and assessments, together with interest on such several amounts from the date of payment, such payment to be made within ninety days from date of entering of final decree."

ADDENDUM No. 2.

ECKELS' REQUEST THAT BAKER ADJUDICATE THE $10,000 NOTE.

This is our Exhibit No. 22. Our opponents have *not* caused this letter to be printed in the record, though it will be noticed they have caused to be printed Mr. Baker's graceful letter of resignation of two years later, on which we comment in our next addendum.

"November 10, 1897.

"Charles H. Baker,
"Receiver, etc.,
'Seattle, Wash.

"Dear Sir:

"I am in receipt of yours of the 29th ultimo, stating your position in regard to your indebtedness to the trust, also of the report of the condition of the record of the proceedings under which your collateral was sold and the written opinion of Judge Stratton, furnished by Mr. Seeley at his request. It is due to yourself as well as the creditors of your trust that the matter be adjudicated at once. Judge Stratton takes the position that the value of the bonds of the Rainier Power & Railway Company, face $20,000.00, when sold to the bank, was sufficient or more than sufficient to pay your note of $10,000.00 to the Merchants' National Bank. The matter in that view can be treated as a claim for an offset by you and the whole dispute brought before the court for settlement on an agreed statement of facts, and I suggest that a petition be prepared, 'In the Matter of Claim of Charles H. Baker for Allowance of Offset to his Indebtedness to the Merchants' National Bank.' The facts all appear to be matters of record and an agreed statement there-

of can be accurately made without any difficulty and submitted with said petition in open court, and the question argued by the attorneys representing the creditors and yourself. It would seem advisable that some outside attorney without interest represent the creditors and you employ such counsel as you see fit. Messrs. Stratton, Lewis & Powell, now representing the trust, doubtless will not desire to appear in the matter in any capacity. A stipulation should be entered into to the effect that all parties will be bound by the decision of the court, and that you will, in the event of the sale of the bonds being declared legal, at once arrange for the settlement of your indebtedness upon a reasonable basis commensurate with the salary which you have been receiving from said trust.

"Please advise me promptly if this procedure is satisfactory to you, in order that I may name an attorney to represent the trust in preparing the statement of facts and making argument before the court.

"Very respectfully,
"JAMES H. ECKELS,
"Comptroller."

What honorable man could have refused this offer, made after he had been permitted to occupy his indelicate position two years? But here is all the explanation he can give:

"Q. You did not claim a legal adjudication under the permission given you by Mr. Eckels, did you?

"A. No.

"Q. Now, then, you quit the trust owing it $10,000.00, so far as you had attempted to clear yourself from it in any court, had you?

"A. So far as any adjudicated claim is concerned.

"Q. You had the right to bring suit for cancellation of that note. Did you do so?

"A. No." (303).

And we have already noted that he finally got rid of the note by having his father's lawyer bid it in at a sale of worthless assets.

"Q. Your $10,000.00 note, then, was sold as a worthless asset of the bank and your father bought it in?

"A. No, it was sold to somebody out of the bank and Mr. Hardin bought it from him later on.

"Q. This Hardin is your lawyer?

"A. Yes." (305).

The fair proposal of Eckels (who, if he had not been the intimate friend of Baker's father, would undoubtedly have insisted long before) was ignored by Baker for nearly two years, until March 1899, when the new comptroller, Dawes, became decisive. We print Baker's second letter of resignation, with our comments, in our next addendum.

Our opponents have printed a letter written by the writer of this brief, recommending Baker for postmaster in handsome terms. That letter was written in 1894, so it antedated Baker's receivership and the character which he revealed under temptations. As Baker's own story in this case confesses utter lack of delicacy and many secretive and improper actions, it is not necessary to explain a letter of recommendation written before. Our opponents have also printed a letter written by Mr. Dawes favorably introducing Mr. Baker. That let-

ter was written several years after Baker's receivership. According to his own story Baker, at the time he got this letter from the former comptroller, Dawes, was secreting an asset of this bank, and as Baker took the stand in this case, he had an opportunity to state, had he so desired, that he was at the pains to tell Mr. Dawes, in asking for this letter of introduction, that he had twelve acres of the bank's tide lands secreted in the name of another man.

ADDENDUM No. 3.

Baker's Letter of Resignation.

Baker practically admits (p. 301), that on Dawes' ruling on the $10,000.00 note, he had to leave the receivership. Like many others, when forced to resign, he determined on a voluntary and virtuous resignation.

"Seattle, Washington, March 13, 1899.
"Hon. Charles G. Dawes,
"Comptroller of the Currency,
"Washington, D. C.
"Dear Sir:

"I respectfully call your attention to your recent decision, whereby a note signed by me prior to the suspension of the bank now becomes an asset of the trust.

[Observe "now becomes." There never was a time when this was not considered an asset. He so admits himself (301). He assumes that

his position had become indelicate all of a sudden.]

This places me in the embarrassing situation of debtor to my own trust, and coming as it does under your decision, it would seem that any right of offset or defense I may have had will no longer hold.

[This was no more true in '99 than it was in '97, when Eckels (Addendum 2) invited him to submit the "offset" to a court.]

I am further in the unfortunate situation of having no money or property or means with which to effect a payment or compromise,

[In this very month, by his own story, p. 271, he was secretly acquiring Block 430, 12 acres of splendidly situated tide lands. They were then worth approximately $10,000.00 and could have paid this note.]

which is made more embarrassing by the fact that there are several notes of similar magnitude in other banks, signed by myself.

"My relationship to the trust is inconsistent, therefore, and for that reason I tender you my resigntaion as receiver.

[It had been inconsistent from the very beginning, four years past, when the creditors, (298), protested against his appointment.]

' 'The proper administration of the trust at the present time should receive all the receiver's time and attention in order to do it justice, and this I am unable to give. I believe it impossible to continue the operation of the trust under the reduced appropriation; which is a further reason why my trust should be vacated. I therefore offer you my resignation, subject to your early convenience and pleasure.

"I would state in this connection that Mr. J. B. Hill has been my assistant and is familiar with the diversified interests and items of the trust in a way that would take a new man several months to become acquainted with, and he would be entirely worthy your consideration as a successor.

[Observe. He was leaving to his successor a claimed liability of $10,000.00 and interest. He now recommends as such successor an intimate friend, who owed him an existing employment.]

I could not have kept him recently except for his personal regard for me, as the compensation was not adequate for a gentleman of his attainments,

[Hill, by his own statement, had been in the honest but not learned occupation of a grocer (240) in 1895, when Baker gave him a clerkship. "Attainments."]

and the fact that outside opportunities are becoming very prevalent; however, with the increased compensation which a receiver would get. he would be willing and able to devote all his time to your trust in a loyal, energetic and efficient manner.

"I desire to thank you personally for the uniform courtesy and consideration you have extended to me and to assure you that from my own standpoint, the official relationship has been as pleasant as possible, and I will consider that I am under obligations to you, so that you may at all times that you so desire, command me.

"Very respectfully,
"CHARLES H. BAKER,
"Receiver."

"Mr. Hill informs me that he was candidate for receiver of Columbia National Bank of Tacoma, and he respectfully refers to his testimonials filed

in your department in October, November and December, 1896."

[The very next day after thus resigning he took up the "Pigott-Hofius transaction" so profitable to his friend Anderson. See next Addendum.]

ADDENDUM 4.

The Pigott-Hofius Transaction.

This occurred in March-April '99, while Baker was still receiver. It was not a sale of the block in question here (172). That had been sold to Simpson in November, 1897. It was a sale of the bank's remaining tide lands surrounding Block 430, (other than block 429, which also had been sold in 1897 to Simpson.)

This latter transaction was brought into the case by us to show the values in March-April, '99, the time when, according to Baker's story, he was buying back the best block of all for mere "cost and interest." In this Pigott-Hofius transaction this very receiver was selling inferior blocks at a rate so much higher that his pretense of buying back at cost and interest, and what is worse his absolute statement that he believed this paltry sum to be the "value," (284), were both false and improbable His own testimony overwhelms him (290).

William Pigott, vice-president of the Pacific Coast Steel Company, paid $1700 for merely contested rights in Block 431(329)and moreover for only a *portion* of that block (332), while buying the surrounding tide lands for $5000, (429, 443, 444, and parts of two or three others.) Notice 429. This was the block that Simpson had kept for himself in the sale of 429 and 430 to him in 1897. Simpson being now in '99 a seller of 429 to Pigott, was himself as well advised as Baker of the great increase of these properties in value. Why should he let the best block of all, twelve acres with sea front, which the others did not have, go for about $400? Besides, the testimony of other witnesses shows that Block 430 was then worth very much more than even Pigott was paying (p. 118).

But in addition to making Baker's repurchase story improbable, this Pigott-Hofius transaction throws further light on his character. He deliberately deceived the Comptroller, Dawes, as to the real purchaser. It is a curious bit of deceit; a device to make a profit to one Anderson, who was his intimate friend (290). Your Honors will see on page 313 that on March 14, '99, Baker receipted to Anderson for $1000.00 in purchase of Block 431. Now, he did not wish to report Anderson's name to the Department in requesting authority to confirm this sale because, as he testified (314), he had been accused of selling certain bonds to Anderson "at a grossly inadequate price" and an inspector had had to investigate the matter. Consequently he re-

ports not Anderson's name, but Hofius', to the Department. That Anderson made an inordinate profit is clear from Pigott's testimony (329). And Baker's statement (322) that "he did not know Anderson was making any profit" seems absurd.

Now, Baker knew Pigott very well (314) and could have made the transaction himself. Anderson instantly indorsed the receipt shown on page 313, and it was then treated as a transaction of Hofius & Company. That this receiver should have given Anderson an intermediary right of sale without believing that Anderson was making a profit is absurd, and yet he so testifies (bottom p. 314). He then reports the transaction to the Comptroller without Anderson's name and shows the price in a way profitable to the trust, but of course does not show the other check, $750.00, which Pigott was giving Anderson. Now the Comptroller had been cautious, and before giving him authority had said (319):

"If you and the representative interests of your trust are satisfied that this is for the best interest of the creditors *and the best proposition you can obtain,* you are authorized to petition the court for an order to sell," etc.

Now on Block 431 Anderson was by undisputed testimony making a profit instantaneously of $750.00 on a sale for $1750. How much he made on the other transactions for the remaining blocks detailed by Pigott at the bottom of page 329, will probably never be known.

This busineess Baker did, moreover, in the last days of his receivership. He actually kept Frater waiting for his commission while he did it (169). Judge Frater became suspicious but could not get facts enough to make an attack (171).

COMMENTS ON OPPONENTS' BRIEF.

The preceding part of our brief was prepared before we received our opponents'.

Their Statement of the Case.

It was nearly impossible that their statement be candid. It is in fact most uncandid.

A. *"Deaths."* Turning to the top of their page 4, the first eight lines contain at least half a dozen misleading statements. They had commenced with, "There were six principal witnesses to the transaction." Then they enumerate these as nearly all lost by death. Why do they mention A. H. Anderson? Baker himself does not mention him as having been present at all, either at the sale *to* Simpson in '97 or at the "repurchase" from Simpson in the spring of '99. The first transaction Baker relates at pages 262-3 of the record, the second at pages 270-1, 284, 295, and the professional statements of Mr. Grosscup and Mr. Bausman (224-6) make it clear that Anderson either never knew anything about these transactions or was

willing not to recall them. His name was brought into it only on account of a collateral transaction, the Pigott-Hofius purchase of the *remaining* tide lands in '99, (for his queer part in that, see *supra Addendum* 4) a transaction brought in by us purely to show the value of Block 430 in '99 as shown by the sums paid for the remaining tide lands. It also threw light on Baker's character in his suppression of Anderson's name, all of which Baker's own testimony and the exhibits (313) fully disclose. *Second.* They mention Hofius as a dead witness lost. Why Hofius? Though Hofius's name was used in the Pigott-Hofius sale, it was admitted by Baker himself that the transaction *was conducted by Pigott.* (314). The dead Hofius, then, knew nothing about the transaction. *The living Pigott testified directly against Baker. Third.* They mention Seeley, the examiner, as dead. Yet Seeley's correspondence has been introduced both by them and us. There is no controversy as to what he reported, because it is in writing. Not a shadow of claim was made anywhere by either party that if living he would contradict or vary or reinforce any statements of either side. Nobody claims that he knew of the subsequent sale to Simpson. He left Seattle in '97 before that. *Fourth.* They mention one Tyler, obscurely referred to by the receiver's bookkeeper, J. B. Hill, as having made some entries at Hill's direction. (232-3). It was not pretended that he was present at any interview or knew anything about the transaction other than

to make clerical entries, nor is there any contention as to what amounts were paid *to* the receivership by Simpson in 1897. *Fifth.* They mention Simpson, the purchaser, as dead, and yet we have already shown (ante 75) that Simpson, if alive, could not contradict Baker's own story without making them both ridiculous.

Against Baker all living witnesses have testified, Turner, Rotch, Pigott, Reed, and even J. B. Hill, his own bookkeeper, injured him as much as any other witness. (*ante* 26-7).

We have already shown (ante 28) that, lamenting the absence of witnesses who are dead, the defendant Baker has failed to call several living witnesses, his own lawyers, who he admits were acquainted with these transactions.

All this, however, is superfluous. Our case was made out of Baker's own mouth.

B. A person reading our opponents' "statement as disclosed by the evidence" would find in the whole of it, pages 18 to 54, not one reference which would clearly bring out to the court any of the following damaging facts against Baker admitted by himself: *First,* that his repurchase was at cost and interest. *Second,* that it occurred distinctly during his receivership. *Third,* that the actual values, when he did so repurchase, in '99, were greatly in excess of mere "cost and interest," $400.00. *Fourth,* his suppression of the sale in his *special* report to the new comptroller, Dawes, in '98.

(*ante,* 14). *Fifth,* the absolute secrecy of the '99 "repurchase." Nothing can the court find in this long statement of theirs to explain also his damaging changes in his answer after our discovery of the railway letter, not a word about the $10,000.00 note, which throws such a light upon his character and his additional motives for secrecy toward his successor and the comptroller; not a word about the dummy corporation and his keeping his name off the directorship and the sudden removal of its records to New York; not a single word about the fact that Norton held unrecorded declarations of trust for two years for this man; not a word in explanation of his failure to call witnesses Brockett, Hardin and Meacham; not a word about his admission that when he "repurchased," as he call it, from Simpson in the spring of '99, Simpson gave him, according to his own story, not one scrap of paper, but held the title during six years from '99 to 1905, just as he had held it from '97 to '99.

Our Opponents' Law Argument.

Our opponents, in drawing their brief, had not before them, to be sure, a copy of ours, but what ours would contain could of course not be unknown to them from experience below. Moreover, the points to be raised in ours were points averred to by the lower court in its final opinion. We conclude, accordingly, that our opponents have already

done all they can to meet the three propositions which we have formulated on our page 31.

Let us advert again to these three legal conclusions of ours in the light of our opponents' brief.

First. Our first was that the '97 sale *to* Simpson was void because (a) the tide lands were realty; (b) that no asset can be sold without the order of a court; (c) that the order of court did not at all include the right to sell realty. The lower court (Addendum 1 ante) fully covered this point by reference to State and Federal laws and decisions absolutely incontrovertible, and we too have discussed it fully on pages 31-34. *This question then was squarely placed before our opponents long ago. Where do they seek to answer it?*

Second. Our second conclusion was that even if there was a legal sale in '97, it was actually for Baker's own benefit (ante 34). We left that to this court upon the facts, adverting, however, to the opinion of the lower court as reinforcing us by its finding, included also in the decree. Again saying that we do not see how the lower court could possibly have found other than it did on this head, we pass to our next.

Third. Our third point was that in any event, Baker's repurchasing, especially at mere cost and interest, during his term as receiver caused such repurchase to inure to this receivership. An answer to our full line of authorities on our page 35 is attempted by learned counsel on page 107. Nobody

can compare either the arguments or the authorities and agree for one moment, we think, with our opponents. They are overwhelmed by both law and reason. Why do they cite *Robertson v. Chapman* and leave out a certain critical distinction which is made in that case? They quote freely and leave out the distinction there made by the Supreme Court itself, that is to say, that the agent repurchasing let his principal know of that fact. (ante 41). The lower court here in its final opinion adverts to the fact that our opponents had cited this case, and that this distinguishing feature, which the court then quoted to them, was in it.

Statutes of Limitation.

On page 43 ante we stated that if the sale to Simpson in '97 was void in law, then this court was confronted not with the question of laches but only with whatever rights defendants might have under statutes of limitation. Citing these statutes, we stated that it would be impossible for Baker, even by payment of taxes during the statutory period, to come within other requirements of local law in respect to good faith and color of title, this on account of his fiduciary relation and personal knowledge of the defects, if any, in his title.

We now have before us their brief and we do not find any argument raised in support of their assignment of error on the statute of limitations.

We accordingly feel that this court, agreeing with the lower court that the sale to Simpson in '97 was void as an unauthorized sale of realty, will not trouble itself deeply on laches.

However, should the court take up that subject, it will find that we have rightly anticipated the error of our opponents in their list of authorities, and that they have failed to see the dstinction between fiduciary and non-fiduciary cases. We mention in their order their citations.

Felix v. Patrick, (on their page 76. See our p. 51) is not a case of fiduciary relations at all. A hasty glance at it, on account of the use of the word "trust" might mislead. The court makes it clear, as we have pointed out on page 51, that there were no relations other than antagonistic ones between the parties.

Hart v. Heidweyer. (their page 77). At the very outset our opponents disclose that this case was one of creditors' pursuit of debtor's property. No confidential relations are even pretended to have existed.

Patterson v. Hewitt. (their p. 84, our p. 50). This citation is indeed one of confidential relations, yet it seems most unjust in our opponents to cite it without adverting to the fact that the court in applying laches against the plaintiff expressly drew attention to the fact that the defendant had "openly repudiated" the trust to his beneficiary and thus

set laches in motion. This is the very essence of our distinction between fiduciary and non-fiduciary cases. Laches does apply after the fiduciary does his part in avowing an antagonistic relation, and squarely putting his cestuis upon notice and compelling them to acquiesce or to proceed against him.

Ferrel v. Lord, (their p. 85), a non-fiduciary case. Yet even there the court in holding plaintiffs to diligence found that they *actually* knew of the state of affairs. They were guilty not merely of negligence *to* discover but *after* discovery.

"All these facts were known to the appellants who, although under no disability, failed to assert," etc. (page 676 of 43 Wash.). Knew what? That the adverse party openly claimed the land and took possession (ib. ....). We should like to know where in the record Baker let anybody know of his interest.

Newbury v. Wilkinson. (their p. 86). Here again is cited a case that is not one of confidential relations. The persons whom the plaintiff was suing were the sureties upon guardian's bond. They owed him none of the obligations of a fiduciary's candor, nor had they dealt in any way in trust property. He had a claim against their principal for misconduct. He did not sue the principal, then dead, but sued them. They could stand and properly did stand upon the strictest law of diligence against a plaintiff. The case seems to us correctly decided and to have no application to this.

And the two cases which are quoted in *Newbury v. Wilkinson,* are neither of them cases against fiduciaries. They are *Nash v. Ingalls,* and *Foster v. Railroad Co.* As to the former see our p. 52. The latter was a case of attempt to set aside a railway foreclosure after long delay.

Gallaher v. Cadwell. (their page 87). Not in the remotest degree affecting fiduciary relations. On the contrary, a case most properly decided without reference to such doctrines, a land office entry woman complaining of a stranger's getting another entry with knowledge that hers existed and then waiting several years while Tacoma was built upon the property.

Duxbury v. Boyce. (their p. 88). They themselves state it as a case "to set aside conveyance on the ground that it was made with the intent to defraud creditors." This disposes of it plainly.

First National Bank v. Strait. (their p. 90). What element of fiduciary relation exists in it we are not yet able to see.

Thompson v. German Ins. Co. (77 Fed. 258). A suit by the receiver of a national bank to collect assessments on the shareholders, including one against a dummy transferee. Not one scintilla of fiduciary relation.

Wood v. Carpenter. (their p. 94, our p. 49). One of the leading cases of creditors' suits. Our opponents' statement of it shows the utter absence of fiduciary relations.

Teall v. Slaven. (their p. 96). The only case applicable at all, misuse by an attorney-in-fact of his agency. Thirty-two years delay during which a town grew to a city and thousands of innocent investors would have to be ruined. Surely a poor citation here to these vacant unimproved tide lands.

Hammond v. Hopkins. (their p. 96, our page 49). A fiduciary case, but here our opponents again leave out the most distinguishing feature of that case. It was a fiduciary case in which laches applied, but why? Because, as we have distinctly noted (ante 50), the purchase of the trustee had been "openly announced in the family." Consequently what the Supreme Court was discussing was not laches *to* discover, but laches *after* discovery, that is to say, laches after notice. Everybody admits laches has application in fiduciary cases. But it is laches after notice brought home, after the discharge of the obligation of candor by the fiduciary.

Their citations on laches summed up fall into two classes. First, creditors' suits, in which alone is found the rule about how, when, and where knowledge was acquired by complainant for his suit; second, fiduciary cases, in none of which is any such rule imposed upon complainant but in which laches is discussed and applied because defendant showed in each instance that he *did* let the beneficiaries know of his hostile attitude or purchase—in, laches being reckoned only from that time (*ante* 63).

Lastly, even as to the creditors' cases, observe that *Hardt v. Heidweyer, Wood v. Carpenter,* and all the rest that lay down the "diligence to discover" rule, *arose on demurrer.* It is a rule of pleading. Defendants have a right, before being put to the expense of trial, to demand a showing of such diligence in these non-fiduciary cases, there having been no duty in defendant to advise or disclose.

The present case, whatever might be the preceding rule, is now on final proof. Should your Honors, like the Supreme Court on final proof in *Oliver v. Piatt, ante* 61,, be uncertain in your minds as to the exact date of knowledge in complainant, you would do as the court did there, decide what, *under the testimony,* was the earliest possible date.

Now, let us see. You would of course take Baker's own story as binding on him.

(1) He nowhere asserts that he or any one in his behalf did advise the Comptroller or the creditors of his "repurchase" or of any subsequent interest.

(2) On the contrary, he does say that between '99 and 1905 Simpson carried it "confidentially in his name" without a scrap of paper (284-5).

(3) Nay, more, he not only admits this secrecy but gives a positive reason for secrecy, his creditors, some of whom were judgment creditors (271) and one of them this very estate (285).

Now down to 1905 this court must assume his complete secrecy. The subsequent period (see *Oliver v. Piatt, supra*), is too short for laches against a fiduciary not showing heavy improvements on the property, openly, and in the *belief* that it had become his.

Next, after 1905.

(1) As before, no assertion by him that he did advise anybody.

(2) Assignment at Olympia (not in the King County records) from Simpson, not to Baker but to Norton of New York. Deed direct from the State to Norton.

(3) Non-recording of that lawyer's two declarations of trust, 1905-7.

(4) In 1907 organization of a Seattle company and removal of *all* its records to New York and most careful withholding of Baker's name from its directory and from nearly all its stock.

(5) That nobody testifies that they knew of his interest and a close friend testifies that he did not know.

Here, then, we stand, on final proof. What else can this court do than affirm Judge Neterer's finding of complete secrecy (*ante* 119)?

Rather than permit such technicality as the how, when and where rule to protect actual fraud proved as here, this court will consider the bill as a *bill of discovery* and the proof accordingly.

All the foregoing is sufficient without repeating our argument, page 44 *ante,* that the Comptroller could not deprive the depositors of this bank of their rights, he a fellow fiduciary of Baker's. We do not see how one executor secretly buying an asset can excuse himself by saying he whispered it to his co-executor.

The court will finally be struck by the failure of our opponents to discuss at all the rule that mere lapse of time is not enough in laches but that some loss or honestly incurred disadvantage in the defendant must be shown by him if wrong doing is made out.

The Wing Examination in '98.

Our opponents discuss this on their pages 97 et seq. They do it and still do not disclose to this court the utter inconsistency of their position. Until '99, according to their theory of defense, Baker had no interest in this property. Now they do not press the fact that Wing made his examination in '98. Are they then to have the benefit of charging us with negligence and at the same time saying there was nothing to discover?

We have discussed this Wing transaction on our page 78, particularly noting the unfairness of defendants' position in saying that we should have been prepared at the trial to supply all kinds of records about Wing, whose name was never mentioned by them in their pleadings and was used

for the first time in the trial. This was clearly a matter for defense, and clearly it was for them to produce any pertinent records in the Comptroller's office (*ante* 80).

Incidentally we note that learned counsel have been at the pains to mention, where it seems to us they might mention matters much more pertinent entirely left out of their statement, that scrutiny had been drawn upon Mr. Baker by a rival electrical syndicate in Seattle. We suggest that some of the scrutiny was caused by the fact, not mentioned by learned counsel themselves, that a receiver, kept in position purely by political influences and owing the estate $10,000.00, which he would neither pay nor adjudicate an alleged defense to, might have brought some of these suspicions on himself.

Turner and Rotch Testimony.

We discussed this at page 70 *ante*. We now have our opponents' argument which we think requires little discussion.

They now, however, take a new view of its consequences. After all, they argue, the statements of Turner and Rotch that Simpson said Baker had an interest, (supposing them to be admissible in law), do not contradict Mr. Baker, for, say they, after March '99, Mr. Baker did have an interest.

But they do contradict him. They contradict him in two ways. First, Baker was giving out to

the world, notwithstanding his repurchase of '99, that Simpson was still the owner. This is what he told Pigott, who during two or three years after '99 tried to purchase the property from Baker (330). This is what he concedes himself when he says that on account of his creditors, he had Simpson carry this thing "confidentially in his name" between '99 and 1903. Thus they both contradict him practically. But one of them contradicts him still more deeply. This is Turner. We have already noted that Turner fixes one of these conversations with Simpson as in the year '98 (*ante,* 29). Simpson's saying that the matter "would not bear investigation." Thus one of Simpson's admissions antedates the period when Baker does admit an interest. It contradicts his statement that he had no interest before '99 and supports the finding of the court in its opinion that he had an understanding with Simpson from the start.

The '97 General Report.

This is a small matter, but it is well to be clear upon it. When Baker asked the Comptroller for permission to buy the tide lands from the State early in '97, he did not mention the contract numbers with which the State labels these contracts. He mentioned only certain "blocks" by plat. There is no evidence that the Comptroller ever knew them by contract number. Now when Baker sold to Simpson in November and reported the sale, two

things are to be noticed. He reports this sale not only in a very general voluminous report, but only by contract number and not by the block. We speak of this general report as voluminous. Small matters could easily get lost in it or escape the attention of a distant office. The original exhibit has come to this court as our Exhibit 9, but our opponents, instead of introducing the report as a whole, selected a specific section referring to this sale, and have printed that on page 200, where it looks very prominent. Now, the original exhibit in its full size is with the other original exhibts transmitted to this court. Your Honors will speedily see that this item becomes there a fairly obscure one. See Baker's examination on this point (296-8).

While this is the least significant of many queer things, it deserves clear notice here in conjunction with the fact that when a few months later the new comptroller, Dawes, called for a special report of everything done under the Seeley order, this sale to Simpson was entirely omitted. (*ante,* 14).

In Conclusion.

The court will notice that the following points made by us are either not anticipated or, from experience in the lower court, are ignored by our opponents.

1. That the sale to Simpson in '97 was void.

2. That the Comptroller as a fellow fiduciary could not waive any of the rights of the creditors of this estate or acquiesce in Baker's misconduct. (*ante* 44).

3. The distinction between fiduciary and non-fiduciary cases and the duty of avowal by the fiduciary. (*ante* 49).

4. The rule in express trusts. (*ante* 62.)

5. The rule in actual fraud proved. (*ante* 65).

6. That in arguing on laches, Baker invokes only lapse of time and none of the prejudicial changes essential in laches (*ante,* 74).

Respectfully submitted,

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